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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 704.

CITY OF PHILADELPHIA,
Petitioner

v.

ELLEN HENNIGAN, ADMINISTRATRIX OF THE ESTATE OF JAMES C. HENNIGAN, DECEASED

and

ROGER A. JOHNSON, ADMINISTRATOR OF THE ESTATE OF ROBERT C. WILSON, DECEASED

and

BONNIE RIDDICK, ADMINISTRATRIX OF THE ESTATE OF JOHN RIDDICK, DECEASED

and

ATLANTIC REFINING COMPANY
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, City of Philadelphia, hereinafter referred to as "City", respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit entered on September 10, 1968 affirming the judgment of the United States District Court for the Eastern District of Pennsylvania entered on December 7, 1966, the Appeals docketed in the United States Court of Appeals for the Third Circuit as Nos. 17017, 17018 and 17019 and the Order of the United States Court of Appeals denying the Petition for Rehearing entered on October 4, 1968.

OPINIONS OF THE COURTS BELOW.

The Amended Opinion of the United States District Court for the Eastern District of Pennsylvania dated November 9, 1967 reported in 282 F. Supp. 667 (1968) (*infra*, p. 34ad). The United States Court of Appeals for the Third Circuit filed an Opinion on October 4, 1968 which is not yet reported in — F. 2d — (*infra*, p. 77ad).

JURISDICTION.

The judgment of the Court of Appeals was entered on September 10, 1968 (*infra*, pp. 80ad-82ad). The Order denying the Petition for Rehearing was entered on October 4, 1968 (*infra*, p. 83ad). The jurisdiction of this Court is invoked under the Constitution of the United States and 28 U. S. C. A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Were not the Learned Courts below on the basis of 28 U. S. C. A. 1359, and the Constitution of the United States Amendments Nos. 9, 10 and 11, without jurisdiction ab initio?

2. Did the affirmance of the Learned Appellate Court below violate the 10th Amendment of the Constitution of the United States and the mandate of the Supreme Court of the United States in failing to apply the interpretation given by the Supreme Court of Pennsylvania to the Statutory and Substantive law of said State?

3. Does not an obvious and substantial decisional conflict between the Circuits and within the Third Circuit, referable to jurisdictional and substantive legal questions, require the Supreme Court of the United States to reconcile these conflicts?

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. Constitution and Amendments 7, 9, 10 and 11.

Article 3, Section 2, Clause 1 of the Constitution of the United States reads, inter alia, as follows:

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . between Citizens of different States . . ."

With particular reference to 28 U. S. C. A. Section 1359:

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to

invoke the jurisdiction of such court." June 25, 1948, c. 646, 62 Stat. 935.

7th Amendment

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules at common law."

9th Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

10th Amendment

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

11th Amendment

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE.

Prior to the date of the accident the City of Philadelphia, hereinafter referred to as City, engaged the services of an independent contractor to construct a connecting storm sewer to join with two other existing facilities. On August 22, 1962 four employees of the contractor, Driscoll Construction Company, hereinafter referred to as Driscoll, died in a fire and/or explosion while working in a tunnel constructed by the contractor. There is no precise evidence, either direct or circumstantial, as to the exact cause of the explosion but it appears that whatever the ignition agent it caused an explosion of the petroleum vapors which had accumulated in the tunnel by reason of leakage from the adjacent refinery and tank farm of Atlantic Refining Company, hereinafter referred to as Atlantic, and had reached the water table at the level of which the men were working in tunnel No. 5 where the accident occurred.

The personal representatives, including two of the decedents' wives and an administrator unrelated to one decedent, brought diversity actions in the U. S. District Court for the Eastern District of Pa. under the Pennsylvania Wrongful Death and Survival Acts [1] against Atlantic and City.

Atlantic and City cross-claimed against each other and Atlantic filed a third-party complaint against the decedents' employer, Driscoll. Before the conclusion of the litigation Atlantic entered into a joint tort feasors release with the plaintiffs for $100,000.00 and a release was exchanged between Driscoll and Atlantic re the compensation exposure

1. Wrongful Death Act, April 15, 1851, P. L. 669, Sec. 19 as amended 12 P. S. 1601, Act of April 26, 1855, P. L. 309, Sec. 1, 12 P. S. 1602, June 7, 1911, P. L. 678, Sec. 1 and April 1, 1937, P. L. 196, Sec. 1. Survival Act of Pa. April 18, 1949, P. L. 512, Article VI, Secs. 601-603, 20 P. S. 320, 603.

in the three cases which resulted in Driscoll being dismissed from the litigation with respect to the third party claim of Atlantic.

Interrogatories were submitted by the court below to the jury which found that the City had been recklessly negligent and that such negligence was the proximate cause of the explosion because of the *faulty design* of the sewer in not conforming to the Pennsylvania Department of Labor and Industry's regulations for such construction, as well as in permitting the accumulation of petroleum products and vapors while the construction was being performed by an independent contractor. It is to be noted that the regulations refer to work to be done in a tunnel and the conditions imposed on this contractor were for the safety of his employees. The construction of the facility required by the City, which at the time of the accident was not as yet commenced by the contractor, has no connection with the regulations. It was the faulty design, drainage and ventilating facilities of the contractor which caused the accident, not the design of the sewer made by the City engineers years before the commencement of construction.

The jury awarded $75,000.00 to the three litigants as punitive damages, pursuant to the trial judge's charge, not on the basis of *faulty design* but on the finding that the accumulating of gases in the tunnel was wanton misconduct. The learned court below entered judgment against the City and denied both cross claims of the City and Atlantic inter se without submitting the issues to the jury. The City filed timely post-trial motions for judgment n.o.v. and new trial which were dismissed.

The City appealed to the United States Court of Appeals for the Third Circuit which affirmed the lower court. A petition for rehearing was denied, following which the present petition for certiorari was filed and is presently before this Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Point 1. The District Court Lacked Jurisdiction ab initio and Both Lower Courts Rendered a Decision in Conflict With a Decision in the Same Circuit.

The record with respect to the claim of Roger A. Johnson, Aministrator of the Estate of Robert C. Wilson, being Appeal No. 17018, is devoid of any evidence which establishes the fact that the Administrator is either a relative or heir of the decedent, to qualify as a diverse citizen. As a matter of fact, the Administrator's application for his appointment states that the only surviving heirs of the decedent are his wife and daughter, which clearly demonstrates a collusively created diversity in violation of 28 U. S. C. A. 1359. See *McSparran v. Weist,* No. 16793 (3 CCA 1968), and *Esposito v. Emery,* No. 16671 (3 CCA 1968) (neither as yet reported in the Federal Reporter System) attached hereto and made a part hereof (pp. 1ad-28ad).

Moreover, there is a presumption against diversity jurisdiction and the burden is upon the one asserting it to affirmatively sustain it. *Bradbury v. Dennis,* 310 F. 2d 73 (10 CCA 1962), cert. denied, 372 U. S. 928 (1963).

While artificially created or manufactured diversity has heretofore been allowed in the Third Circuit and various other Circuits, it is expressly forbidden by the 9th and 10th Amendments of the Constitution and by Statute, see 28 U.S.C.A. 1359.

The Third Circuit has now belatedly recognized this fact in two recent decisions: *McSparran v. Weist* and *Esposito v. Emery, supra.*

However, and laudable as this action is, the decisions still violate the constitutional amendments and statute,

supra, in that they restrict the disposition of this jurisdictional question to cases where the Statute of Limitations has not run (i.e., prospectively). In cases where the State Statute has barred the action, the learned court below states that it will not dismiss the actions as there would be no place for the plaintiffs to obtain redress in the State Courts. See the conflict with *Van Der Schelling v. U. S. News and World Report, Inc.,* 213 F. Supp. 756 (1963), aff. 324 F. 2d 956, cert. denied, 377 U. S. 906.

Manifestly, this reasoning is both illogical and contradictory. If there was no jurisdiction initially, then the fact that the Statute of Limitations has or may run is of no relevance since jurisdiction is determined when the suit is started, or not at all. *Julien v. Sarkes Tarzian, Inc.,* 352 F. 2d 845 (7 CCA 1965).

The lower court properly rectified the abuse heretofore created by manufactured diversity; however, in doing so it again violated the Constitutio the Amendments thereto and the Congressional mandate, hereinabove pointed out, when it stated that its opinion is prospective and not retrospective.

In *Van Der Schelling v. U. S. News and World Report, Inc., supra,* the lower court in affirming Judge Joseph S. Lord, III, the District Court Judge, per curiam, approved the following language used by the Trial Judge in his opinion (at page 763):

> "It would appear that, unfortunately, if plaintiff's present federal action is dismissed any state action will be barred by the Statute of Limitations. If that result should follow, I regret that I am its instrument."

It is evident that *Esposito* and *McSparran, supra,* are in direct conflict with the lower court's own decision in *Van Der Schelling.* In both the *Esposito* and *McSparran* opinions the lower court did not refer to or cite the law in

their own *Van Der Schelling* case, or state that any prior decision inconsistent with the present opinions is modified or overruled to the extent of such inconsistency.

Congress, in enacting Section 1332 of 28 U. S. C. A. confers jurisdiction in certain instances, one of which is where there is diversity of citizenship and the amount is in excess of $10,000.00. This congressional mandate imposes a duty on the learned courts below to determine sua sponte whether or not diversity did, in fact, exist and to rule that when and where diversity does not exist there is no jurisdiction. These courts are without power and not free to arbitrarily differentiate between cases in a select class where the statute of limitations has or has not barred the action, and legislate by judicial fiat a right which has not been conferred by Congress. It is axiomatic that Courts which are created by the Legislature, as are all of the lower federal courts, cannot transcend the specific jurisdiction conferred upon them.

Moreover, jurisdiction can be raised at any time and it may not be conferred by waiver or estoppel. *Pacific National Insurance Co. v. Transport Insurance Co.*, 341 F. 2d 514 (8 CCA 1965), cert. denied, 381 U. S. 912 (1965).

With respect to all three cases currently before the Court, it is the contention of petitioner that jurisdiction is lacking for the following reasons:

a. The City of Philadelphia is immune from suit since the activity giving rise to the within causes of action was a governmental function;

b. The design and construction of a storm sewer by a municipality is a governmental function performed as an agent of the sovereign state insulating the municipality from suit by a third party; and

c. The ordinance of the City of Philadelphia alledgedly waiving its sovereign immunity must be strictly interpreted and it does not expressly provide for suit against the municipality in the federal courts. See copy of ordinance which is attached hereto and made part hereof.

"(Bill No. 1524.)

AN ORDINANCE

Amending Title 21 of The Philadelphia Code by adding Chapter 21-700, providing for a waiver by the City of governmental immunity from suit, under certain terms and conditions.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Title 21 of The Philadelphia Code is amended by adding Chapter 21-700, as follows:

TITLE 21 MISCELLANEOUS

* * *

CHAPTER 21-700: WAIVER OF GOVERNMENTAL IMMUNITY

§ 21-700 Acts of City Employees.

(a) Any person sustaining bodily injury or death caused by the negligence or unlawful conduct of any employee of the City, while the employee is acting within the scope of his office or employment, shall have the right to bring suit against the City in accordance with the same rules of law as applied by the Courts of

this Commonwealth against any other party defendant. In such suits the City shall not plead governmental immunity as a defense.

(b) Nothing contained herein shall be construed to repeal or modify the Workmen's Compensation Laws.

Explanation:

Italics indicate new matter added to existing ordinance.

CERTIFICATION: This is a true and correct copy of the original Ordinance approved by the Mayor on February 8, 1962.

NATHAN WOLFMAN
Chief Clerk of the Council"

As to a and b above—there is no question that a municipality acting as the agent of the sovereign, is immune from tortious conduct in the performance of a governmental function, e.g., a school district, a fire or police department, etc. *Graysneck v. Heard,* 422 Pa. 111 (1966).

Is the design and construction of a sewer a governmental function? The answer to this question depends on whether the sewer is intended to benefit the citizens of a community individually or collectively. Another indicia for this determination is whether a municipality imposes a tax or sewer rent individually on its citizens. A clear illustration of this dilemma are two cases whose facts are similar but the benefit derived by the citizens was, in one case, individual, and in the other collectively.

In *Hill v. Allentown Housing Authority,* 373 Pa. 92 (1953) the Court held that the maintenance of a refuse dump which served a limited number of citizens was not a governmental function.

In *Kunz v. Titusville,* 373 Pa. 535 (1953) it held that the "dump" served the interests of the public generally and was therefore a governmental function.

In the present case the construction intended was a storm sewer, as distinguished from a sanitary sewer.

The latter serves individual members of the public and a charge or sewer rent is imposed by the City. In the former, the sewer benefits the public collectively, and no charge is made, and is intended to drain surface waters rather than sewage, as in the case of sanitary sewers.

Since the primary issue of negligence in the present case is based on the faulty design of the sewer, it becomes imperative to determine whether this function is governmental in nature.

It is generally accepted that immunity from liability of faulty design of sewers is a governmental function. Some authorities base this conclusion on the fact that municipalities are in the exercise of legislative power in the adoption of plans for local improvements. See *Wilcox v. Rochester,* 190 N. Y. 137, 82 N. E. 119, 17 LRA (NS) 741, 13 Ann. Cas. 759.

In Philadelphia the Home Rule Charter of April 17, 1951, Chapter 8, Section 5-800(a) and (b) gives City Council the power to authorize the Water Department to "acquire, design and construct additional sewage disposal plants and facilities." Sometimes the exercise of the power to make local improvements is considered to be judicial or quasi-judicial. See *Gaines v. New York,* 156 App. Div. 789, 142 NYS 401, aff'g 78 Misc. 126, 137 NYS 964. In accord: *Reed v. Tarentum,* 213 Pa. 357 (1906); *Aron v. Philadelphia,* 310 Pa. 84 (1933).

This Court, in *Johnson v. District of Columbia,* 118 U. S. 19 (1886) stated:

> "The duties of the municipal authorities, in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi-judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon consideration affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage, is *not* subject to review by a court or jury . . .".

It has long been the law that a state is constitutionally immune from actions brought in federal courts by its own citizens or by citizens of other states. *Scott v. Board of Supervisions of Louisiana State U.*, 336 F. 2d 557 (5 CCA 1964). In creating a governmental agency such as the City of Philadelphia, a state may either clothe that agency with its own immunity or waive such immunity. *Pittsburgh v. Tennessee-Missouri Bridge Comm.*, 359 U. S. 275 (1959). In accord: *Graysneck v. Heard, supra.* Consent to suit in Federal Court must be clearly and unmistakenly given and in the absence of such a clear declaration that state has not so consented. USCA Const. Amendment 11. *Southern Ry. Co. v. South Carolina State Highway Dept.*, 246 Fed. Supp. 435 (DC SC 1965).

Respondents base their standing to sue in the federal courts on the City Ordinance which allegedly waives the sovereign immunity. However, it is petitioner's contention that the ordinance does not confer the right to sue the City in the Federal Court since no express consent is included therein. See the Pennsylvania Statutory Construction Act, 46 P. S. 501 et seq. Moreover, the settled public policy of a state cannot be changed except by state statute. The

limited waiver of immunity by the City of Philadelphia, which is contrary to the settled public policy, was enacted by ordinance of City Council, but is in conflict with the law of Pennsylvania and must bow to it. See *Graysneck v. Heard, supra.*

Point 2. The Lower Courts Have Decided Important State Questions in a Way in Conflict With Applicable Pennsylvania Law.

(a) Pipeline Act of Pennsylvania Not Applied by Lower Court.

In addition to the errors on the jurisdictional issues above, the learned court below violated the Tenth Amendment to the United States Constitution in failing to apply the statutory law and the decisional law of the highest court of the Commonwealth of Pennsylvania and the mandate of this Court in *Erie v. Tompkins,* 304 U. S. 64 (1938); *Klaxon Co. v. Stentor Mfg. Co.,* 313 U. S. 487 (1942) and *Guaranty Trust Co. v. York,* 326 U. S. 99 (1945).

The City's position is that the proximate cause of the fatal accident was the admitted leakage and seepage of petroleum products from Atlantic's refinery and tank farm which was within 15 feet of the site of the tunnel where the accident occurred.

The law of Pennsylvania, with respect to the liability of Atlantic is unequivocably expressed in a Pennsylvania Act of Assembly known as the Pipeline Act; the Act of April 9, 1873, P. L. 66, Sect. I; 15 P. S. Sect. 2111 et seq. which provides inter alia:

> "The provisions of the act, relating to corporations . . . approved July 18, 1863 . . . so far as applicable . . . shall include the business of buying, producing,

storing, *refining,* transporting, selling and dealing generally in petroleum . . ." (Emphasis added.)

The Act further, at Sec. 2153(g) provides:

"Any company laying a pipe line within this Commonwealth shall be liable for all damage occationed by *leakage, breaking of pipes, or tanks, or any negligence in the construction, maintenance of operation thereof.* All tanks erected within this Commonwealth for the storage or transportation or distribution of oil or any petroleum products, shall be protected and surrounded by proper ditches and embankments, so that in case said tanks shall break or be broken, the oil or petroleum products stored cannot damage adjoining or adjacent property." (Emphasis added.)

There were no ditches or embankments constructed by Atlantic to contain the leakage, seepage or overflow on its premises and to keep it from permeating the city's ground.

The Pennsylvania Supreme Court has held that under the aforementioned Pipeline Act, liability upon a corporation covered by the Act, such as Atlantic, is imposed *without proof of negligence,* if leakage and seepage of oil has been established, as here. It has further held that circumstantial evidence is more than enough to ascribe a leakage of petroleum products to the pipe line company. *Jackson v. H. S. Pipe Line Co.,* 325 Pa. 436 (1937). It was admitted in the pleadings, depositions and by Atlantic experts and officials during the trial, that its petroleum product leaked into the subsurface of the City's ground.

Despite the fact that the law in Pennsylvania has been set forth in a statute which has been ruled upon and adopted

by the Supreme Court of Pennsylvania, the Federal trial court flatly refused to charge the jury with respect to the pipeline Act, although requested to do so by counsel for the City. This was clearly violative of the mandate of this court expressed in *Erie v. Tompkins, Klaxon v. Stentor* and *Guaranty v. York, supra.* Notwithstanding the law of Pennsylvania on this subject the trial court, with respect to the liability of Atlantic to the respondents charged the jury as follows (Joint App. 2886a-2887a):

> "You are further advised that even if you find that there had been in the past leakage, seepage or spillage of petroleum products onto the ground owned by Atlantic that such seepage or leakage *is not in and of itself* any evidence of negligence. It would only be an act of negligence if there was a spillage and leakage in excess of the amount which would be reasonable under the circumstances, and in this case I recall no evidence which would establish unreasonable, or excessive, or unnecessary leakage so far as it can pertain or be connected to this case. So, accordingly, since the mere fact of leakage is not enough to establish negligence the only theory of alleged negligence which you may consider is was there a failure by Atlantic to properly advise either the City and/or Driscoll Construction Company, or both, of any hazards which would occur by reason of past seepage." (Emphasis supplied.)

The evidence in the case clearly discloses that officials and experts of Atlantic testified that chromatographs of the samples of petroleum products found in the tunnel were the products manufactured and/or distributed by Atlantic.

(b) Trial Court Erroneously Imposed Upon the City of Philadelphia Control Over the Employees of an Independent Contractor.

Clearly the lower court contravened the laws of Pennsylvania as recently promulgated, in *Cellender v. Allegheny County Sanitary Authority,* 208 Pa. Super. 390 (1966) Allocatur denied by the Supreme Court of Pennsylvania, and *Hader v. Coplay,* 410 Pa. 139 (1963); *Peter v. Public Constructors Inc.,* 368 F. 2d 111 (3 CCA 1966); *Liska v. United States,* 369 F. 2d 288 (2 CCA 1966). *Moushey v. U. S. Steel Corp.,* 374 F. 2d 561 (3 CCA 1967).

The City, pursuant to a written contract, engaged an independent contractor to erect the storm sewer in question. In accordance with the laws of Pennsylvania, one who employs an independent contractor is not responsible for the torts of the independent contractor.

Under the law the City had and has a right to have its inspectors and engineers present to ascertain that the work of the independent contractor is being done in accordance with the plans and specifications. The mere fact that such employees are at the job site is not evidence that they exercised any control over employees of the independent contractor. See *Cellender, Hader, Peter, Liska, Moushey, supra.* Also see *Silveus v. Grossman,* 307 Pa. 272 (1932); *Powell v. Ligon,* 334 Pa. 250 (1939).

By contending that the City had control over the employees of the independent contractor, counsel for respondents and the trial court have placed themselves on the horns of a dilemma for if each plaintiffs' decedents were, in fact, employees of the City, the Court is without jurisdiction.

In this posture, all the rights and remedies of the decedents, their fiduciaries and dependents, would be confined and regulated by the Workmen's Compensation Act of Pennsylvania, 77 P. S. 1, et seq. and the common law actions of the respondents, under the Wrongful Death and Survival Act, *supra,* could not be maintained. See *Moushey, supra.*

(c) Punitive Damages Were Erroneously Imposed Upon a Municipality.

Although under Pennsylvania Law, punitive or exemplary damages may be made against a corporation for the acts of its employees, the conduct of the agent who inflicts the injuries must be greatly outrageous to justify vicarious imposition of such damages, *Stevenson v. Economy Bank of Ambridge,* 413 Pa. 442 (1964).

The outrageous conduct must consist of malice, oppression, willful or intentional misconduct or such reckless disregard of the rights of others as to raise a necessary presumption of conscious indifference to consequences, *Richette v. Pennsylvania Railroad,* 410 Pa. 6 (1963); *Chambers v. Montgomery,* 411 Pa. 339 (1963).

It is to be noted that these authorities deal with acts of commission rather than omission by the agent. In the present case arguendo the most that can be said is that the inspector for the City of Philadelphia was guilty of acts of omission. Hence, under such circumstances, punitive damages cannot be assessed against the City.

Moreover, research fails to demonstrate any case in Pennsylvania, and to a limited extent, in other jurisdictions, where punitive damages have been assessed against a municipality, *Hermits of St. Augustine v. Philadelphia County,* Bright M. P. 116, 4 Clark 120, 7 Pa. L. J. 124; *Trustees of St. Michael's Church v. Philadelphia County,* Bright M. P. 121, 41 Clark 150, 7 Pa. L. J. 181; *Newcastle Products, Inc. v. School District of Blair Township,* 18 F. Supp. 335 (1936).

Finally, it is to be noted that the present actions were brought under the Wrongful Death and Survival Acts, *supra,* neither of which statutes confer the right of a court to assess punitive damages.

The only rights conferred are those which are specifically enumerated in these acts. In *Murray v. P. T. C.,* 359 Pa. 69, 71 (1948) the Supreme Court of Pennsylvania in this regard stated:

> "The purpose of this legislation is to provide compensation, not punishment . . ."

The learned District Court charged the jury that it could *punish* the City by awarding *punitive* damages. Joint appendix 2907a and we quote:

> "Now punitive damages are allowed and awarded as a punishment, that is why you use the word 'punitive' to the defendant and as a warning and example to deter him and others from committing like offenses in the future. Under this theory such damages are allowed on grounds of public policy and in the interest of society and for the public benefit. Not as compensatory damages, but rather in addition to such compensatory damages. It has been said that they are imposed in view of the enormity of the offense rather than as a measure of compensation to the plaintiff."

(d) Misinterpretation of Law.

Fundamental and reversible error was committed by the learned trial judge in his charge to the jury equating contributory negligence with proximate cause, absolutely contrary to the law of Pennsylvania. See Joint Appendix 2861a, *Middleton v. Glenn,* 393 Pa. 360 (1958); *Crane v. Neal,* 389 Pa. 329 (1957): *Hamilton v. Fean,* 422 Pa. 373 (1966) and in making decedents' donee or third party beneficiaries contra the terms of the City contract with Driscoll and Pennsylvania law. *Spires v. Hanover Fire Ins. Co.,* 364 Pa. 52, 70 A. 2d 828 (1950).

Point 3. The Learned District Court Departed From the Accepted Course of Judicial Proceedings by Its Failure to Submit a Cross Claim for Consideration by the Jury.

At the conclusion of all the evidence, counsel for the City, without objection, moved the court to transfer all of Petitioner's and Respondents' evidence into the record, which was done, in affirmative support of the City's cross-claim against Atlantic in these separate causes of action.

The trial judge failed to instruct the jury on the evidence applicable to the City's cross claim. As a matter of fact, the trial judge gave instructions which were tantamount to binding instructions, in favor of respondent Atlantic. See the Court's instructions, Joint Appendix 2886a, 2887a.

This clearly was violative of the City's rights under the Seventh Amendment of the United States Constitution because it deprived the jury from properly adjudicating a fact issue. *Baylis v. Travelers' Insurance Co.,* 113 U. S. 316 (1885).

The issues in this case are demonstrably national in scope and of the utmost importance. Because of the magnitude of the problems, the conflicts among the circuits and within the 3rd Circuit and the conflict between the third circuit and the Pennsylvania Appellate Courts and its legislature, we respectfully request this court to exercise its supervisory powers and decide the issues to establish uniformity and compel adherence to the Constitution, Statutes and this honorable Court's prior mandates.

If this honorable Court adjudicates the matters herein contained with particular reference to, but not limited to, jurisdiction, it may not only unclog the federal calendar in the ten circuits, but deter unjustified litigation therein and wrongful jurisdiction. This will also achieve the proper

balance between State and Feedral jurisdiction contemplated by the Constitution and prevent injustice and prejudice.

WHEREFORE, for the reasons outlined herein, it is respectfully requested that a Writ of Certiorari to the United States Court of Appeals for the Third Circuit issue to review the final judgment entered therein on September 10, 1968.

Respectfully submitted,

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EXHIBIT I.

McSPARRAN v. WEIST

Majority Opinion

This appeal was argued before a panel and we ordered it to be reargued before the court en banc with Esposito v. Emery so that we could review the troublesome question of the jurisdiction of a federal court where diversity of citizenship is created or "manufactured" by the appointment of a nonresident guardian of a minor, selected solely for the purpose of creating diversity. Here federal jurisdiction over the parent's consequential claim is asserted as pendent to the "manufactured" diversity claim of the child for damages.

Richard R. Riegner, a minor, was injured in an automobile accident on November 27, 1966, in Berks County, Pennsylvania, where he lived with his mother, Martha M. Fritzinger. In January 1967, being then just under twenty years of age, he petitioned the Orphans' Court of Berks County with his mother's consent and joinder for the appointment of a guardian of his estate, setting out that the only funds which might come into the guardian's hands were "monies which may be obtained by suit or settlement in an action which the proposed guardian will institute in the . . . [United States District Court for the Eastern District of Pennsylvania sitting] at Philadelphia to recover for injuries sustained by said minor" as a result of the accident. On February 6, 1967, the Orphans' Court ap-

pointed Stella McSparran as "guardian". In view of the prayer of the petition we shall assume that it intended her to act as guardian of Riegner's estate.

A few weeks later Stella McSparran, as guardian of Riegner's estate, instituted the present action in which she was joined as plaintiff by Mrs. Fritzinger, who designated herself as "Parent and Natural Guardian of Richard R. Riegner, a Minor, in Her Own Right."[1] Mrs. Fritzinger claimed damages in the amount of $17,500 for loss of the minor's services and earning power until he attained majority and for medical expenses which she had been compelled to expend and would be required to expend until he attained majority.[2]

One of the defendants moved to dismiss Mrs. Fritzinger's claim on the ground that she was not of diverse citizenship from the defendants and that her claim could not be sustained on a theory of pendent jurisdiction. The district court granted dismissal, and in doing so expressed the hope that the question, on which the judges of that court had already expressed differing views, would be resolved by an immediate appeal. 270 F. Supp. 421 (E. D. Pa. 1967).[3] The judgment, however, was not a final judgment under 28

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1. The complaint gives no explanation for the absence of the minor's father as a party.

2. The district court's opinion states that Mrs. Fritzinger's claim sought "out-of-pocket medical expenses" but it is clear from her allegations that the claim was for more than this. In the absence of any indication by the district court that the claim that she was damaged to the extent of $17,500 lacked bona fides, we shall assume that the claim met the required jurisdictional amount. See St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 288-89 (1938); Jaconski v. Avisun Corp., 359 F. 2d 931, 934-35 (3 Cir. 1966); Brough v. Strathmann Supply Co., 358 F. 2d 374, 377-78 (3 Cir. 1966); Wade v. Rogala, 270 F. 2d 280, 284-35 (3 Cir. 1959).

3. See Berman v. Herrick, 30 F. R. D. 9 (E. D. Pa. 1962), permitting intervention in a diversity case under Rule 24(b) of the Federal Rules of Civil Procedure, although the intervenors were not of diverse citizenship from the opposing party and did not meet the jurisdictional amount; Newman v. Freedman, 262 F. Supp. 106 (E. D. Pa. 1966), holding that a nondiverse parent's claim could be maintained as pendent to that of a minor.

U. S. C. § 1291, and we therefore remanded the record to the district court to afford the parties an opportunity to obtain compliance with the requirements of Rule 54(b) of the Federal Rules of Civil Procedure for the entry of a final judgment as to Mrs. Fritzinger's claim in her own right. We directed that if such a final judgment should be entered within thirty days the record should forthwith be returned to us, and thereupon, having meanwhile retained jurisdiction, we would determine the appeal which would be deemed filed nunc pro tunc as of the date of the return of the record to this court, without the necessity of filing any additional briefs or appendices. We also directed that if such a judgment was not entered within the time fixed the appeal would be quashed. The district court entered a final judgment against Mrs. Fritzinger within the prescribed time and the appeal is now properly before us for decision.

It is conceded in the record as well as in the briefs and arguments of counsel that the guardian here is a straw party, chosen solely to create diversity jurisdiction. Before we reach the contention that the mother may maintain her pendent claim in her own right, we are therefore required to determine first whether such artifically created diversity is an adequate foundation for federal jurisdiction.

As early as 1808 Chief Justice Marshall stopped counsel in the course of an argument on the question of jurisdiction to say: "The present impression of the court is, that the case is clearly within the jurisdiction of the Courts of

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3. (continued)

The court below expressly declined to follow the *Newman* case. After this appeal was taken, three judges sitting together in the district court also declined to follow *Newman* and held that there was no jurisdiction over the claim of nondiverse parents who attempted to join their claim with that of their child suing by a foreign guardian, and that even if the court had jurisdiction over the parents' claim, it would exercise its discretion to decline to hear it. Olivieri v. Adams, 280 F. Supp. 428 (E. D. Pa. 1968).

The *Newman* case is discussed in Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 662-63 (1968).

the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the circuit court [on the ground of diversity of citizenship]." Chappedelaine v. Dechenaux, 8 U. S. (4 Cranch) 306, 308 (1808). A series of Supreme Court cases since that time has held that the citizenship of the fiduciary rather than the beneficiary is controlling in the determination of diversity of citizenship. These cases have involved the citizenship of executors and administrators,[4] trustees [5] and general guardians.[6]

The adoption of the Federal Rules of Civil Procedure has created some controversy on whether the representative must be the real party in interest under Rule 17(a) or need merely have capacity to sue under Rules 17(b) and (c). Rule 17(a) authorizes a personal representative such as a guardian, executor or administrator, to sue in his own name without joining the beneficiary; Rule 17(b) in effect provides that the capacity to sue or be sued of one acting in a representative capacity shall be determined by the law of the state in which the district court is held; and Rule 17(c) provides that whenever an infant or incompetent person has a representative such as a general guardian, committee or conservator, the representative may sue or defend on behalf of the infant or incompetent, and if he does not have a duly appointed representative he may sue or be sued by his next friend or by a guardian ad litem. The focus of the rule is on capacity to sue, and it does not purport to establish standards for the determination of diversity of citizenship. Indeed, as Rule 82 expressly states, the rules do not affect the jurisdiction of district courts. Even though Rule 17(c)

4. See Childress v. Emory, 21 U. S. (8 Wheaton) 642, 668-69 (1823); Rice v. Houston, 80 U. S. (13 Wallace) 66 (1871).

5. See Coal Company v. Glatchford, 78 U. S. (11 Wallace) 172 (1870); Dodge v. Tulleys, 144 U. S. 451 (1892).

6. See Mexican Central Railway v. Eckman, 187 U. S. 429 (1903).

authorizes an infant or incompetent to sue or be sued by his next friend or by a guardian ad litem, it has been held that the citizenship of one acting in such a limited representative capacity, although clothed with capacity to sue, is not determinative of diversity of citizenship.[7]

The substantive status of the various kinds of representatives is not, of course, uniform, and their authority and duties differ widely. In general, executors, although acting by virtue of court appointment, owe their position to their designation by the testator,[8] and administrators to their relationship to the deceased intestate.[9] While an executor or administrator takes title to the property of the decedent,[10] a guardian of the person of a minor or other incompetent has no interest in his ward's property and a guardian of his estate does not take legal title to the property, which remains in the ward, but merely acts as its custodian or manager. A trustee, on the other hand, is of course vested with the legal title to the property of the trust. See Provident Trust Company of Phila. Case, 346 Pa. 37, 39, 29 A. 2d 524, 526 (1943), Stern, C. J. While, therefore, a guardian of the estate of a minor, does not have title to the property of his ward and may in a certain sense not appear to be the real party in interest, he is expressly authorized by Rule 17(c) to sue on behalf of his ward.

We are not here concerned, however, with capacity to sue under Rule 17, nor with the question whether the fiduciary is the real party in interest. Our problem is whether

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7. See Appelt v. Whitty, 286 F. 2d 135 (7 Cir. 1961); Berkowitz v. Philadelphia Chewing Gum Corp., 303 F. 2d 585 (3 Cir. 1962), where it was unnecessary to decide the question. See also Blumenthal v. Craig, 81 Fed. 320 (3 Cir. 1897) and Voss v. Neineber, 68 Fed. 947 (W. D. Ohio 1885), decided before the adoption of the Federal Rules of Civil Procedure.

8. See, e. g., Pennsylvania Fiduciaries Act of 1949, § 305(a), 20 Purdon's Pa. Stat. Annot. § 320.305(a).

9. See, e. g., Pennsylvania Fiduciaries Act of 1949, § 305(b), 20 Purdon's Pa. Stat. Annot. § 320.305(b).

10. See, e. g., Pennsylvania Fiduciaries Act of 1949, §§ 103-4, 20 Purdon's Pa. Stat. Annot. §§ 320.103-4.

for purposes of diversity jurisdiction we should look to the citizenship of the representative, here the guardian of the estate of a minor, or to the person on whose behalf he acts. In Mexican Central Railway Co. v. Eckman, 187 U. S. 429 (1903), the Court held that the citizenship of the guardian of the person and estate of a minor governed in the determination of diversity of citizenship, because the guardian "had the right to bring suit in his own name" under the law of the state of his appointment. But in referring to the **Eckman** case with approval in Lumberman's Mutual Casualty Co. v. Elbert, 348 U. S. 48, 51 (1954), the Court characterized the guardian as the real party in interest. In Fallat v. Gouran, 220 F. 2d 325 (3 Cir. 1955), we followed the **Eckman** case and held that diversity of citizenship existed on the basis of the citizenship of the guardian of the estate of a mental incompetent and that the citizenship of the incompetent himself was not the test. In that case residents of Pennsylvania were involved in an automobile accident in Pennsylvania and the married daughter of the incompetent, who was a New Jersey citizen, brought suit in her own name as his guardian. We sustained federal jurisdiction because of the diversity of the daughter's citizenship from that of the defendants although no diversity existed between the defendants and the incompetent himself. We declined to follow the decision to the contrary in Martineau v. City of St. Paul, 172 F. 2d 777 (8 Cir. 1949).

These decisions deal with the party whose citizenship is to be the test in the determination of the existence of diversity. They do not decide the problem now before us—the effect of the artificial creation or "manufacture" of diversity. As recently as 1954 the Orphans' Court of Philadelphia hesitated to appoint a nonresident guardian because its general rule limited appointment to those who were within its jurisdiction and therefore amenable to its process and to

its supervisory authority and control. After a factual determination that larger verdicts were generally obtained in the United States District Court for the Eastern District of Pennsylvania than in the Common Pleas Courts of the state the Orphans' Court concluded that, since the only asset of the minor's estate was the personal injury claim, it would yield to the request that it appoint an out-of-state guardian because its primary concern was the financial benefit of its ward. The court had some doubt whether diversity jurisdiction would be found to exist by the federal courts but considered this a question for the federal courts themselves. See Kaufmann Estate, 87 Pa. D. & C. 401 (1954).[11] Since the publication of that opinion the rivulet of "manufactured" diversity cases has swollen to a stream of wide dimensions. The American Law Institute's detailed study of a sample of the diversity cases filed in the Eastern District of Pennsylvania during 1958 and 1959 indicated that 20.5 per cent of them were brought by out-of-state personal representatives of Pennsylvania citizens against Pennsylvania defendants.[12] We are advised that one out-of-state citizen is the guardian in sixty-one pending diversity cases in the Eastern District of Pennsylvania.

The desire of suitors to seek justice in the federal courts carries, of course, no stigma. Where actual diversity exists among the appropriate parties, the choice to resort to the federal courts rather than the state courts cannot be denied them. Nor does a barrier grow simply because an increasing number of litigants prefer the federal to the state jurisdiction. But cases in which a straw or nominal fiduciary is appointed to create diversity stand on totally different ground than those in which the courts are simply

11. A year earlier in Johnson, Minor, 3 Pa. Fiduciary Rep. 337 (Orphans' Court, Delaware County 1953), a local court refused to remove a guardian who had been appointed to create diversity.

12. American Law Institute, Study of the Division of Jurisdiction Between the State and Federal Courts (Part I), pp. 170-77 (Official Draft, 1965).

concerned with the general question whether the citizenship of the personal representative or his ward or beneficiary should be the test of diversity jurisdiction. In cases of "manufactured" diversity jurisdiction there is brought into play the question of the applicability of 28 U. S. C. § 1359 which provides: "A district court shall not have jurisdiction of a civil action in which a party, by assignment, or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

"Manufactured" diversity jurisdiction is not a new phenomenon in this Circuit. In Jaffe v. Philadelphia & Western R. Co., 180 F. 2d 1010 (3 Cir. 1950), our first case on the subject, we sustained a diversity action under the wrongful death and survival statutes of Pennsylvania although the New Jersey plaintiff who was appointed as administratrix ad prosequendum was a stenographer employed in the office of the widow's attorney. We held that the administratrix ad prosequendum was the real party in interest and that her selection did not amount to collusion under what is now 28 U. S. C. § 1359, although the lawsuit apparently was the only asset under her nominal management. We placed heavy reliance on Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931), where Mr. Justice Roberts said: "To go behind the decree of the probate court would be collaterally to attack it, not for lack of jurisdiction of the subject-matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it."

In Corabi v. Auto Racing, Inc., 264 F. 2d 784 (3 Cir. 1959), the mother of a deceased minor resigned as administratrix of his estate to permit the appointment of a nonresident so that suit could be brought in the federal court. In a unanimous decision by the court en banc we held in an opinion by Chief Judge Biggs that the nonresident administrator d.b.n. had capacity to sue and that his citizenship

rather than that of the beneficiaries of the decedent's estate was determinative of diversity jurisdiction. We also held that § 1359 did not bar the action, because there was involved no collusion between plaintiff and defendant in fraud of the court, and the action was not "improperly" brought since there was no impropriety or irregularity involved in the perfectly valid proceeding in the state court for the appointment of the out-of-state fiduciary. 264 F. 2d at 786. **Corabi** has become a leading case and is the authoritative foundation for the maintenance of "manufactured" diversity jurisdiction.[13]

While we have not had occasion to deal expressly with "manufactured" diversity jurisdiction in the case of the guardian of the estate of a minor, other courts have applied **Corabi** in such cases.[14] Whatever refinement might justify a distinction between the case of a guardian of the estate of a minor and cases such as an administratrix ad prosequendum or an administrator d.b.n., we prefer to deal with the problem in its broader dimensions and determine the effect of "manufactured" diversity jurisdiction in the light of § 1359.

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13. See Lang v. Elm City Construction Co., 324 F. 2d 235 (2 Cir. 1963), aff'g per curiam 217 F. Supp. 873 (D. Conn. 1963); Stephan v. Marlin Firearms Co., 325 F. 2d 238 (2 Cir. 1963), aff'g on opinion below 217 F. Supp. 880 (D. Conn. 1963); Janzen v. Goos, 320 F. 2d 421 (8 Cir. 1962); County of Todd v. Loegering, 297 F. 2d 470 (8 Cir. 1961). Cf. Curnow v. West View Park Co., 337 F. 2d 241 (3 Cir. 1964); Borror v. Sharon Steel Co., 327 F. 2d 165 (3 Cir. 1964). For a general discussion of the problem see Cohan & Tate, Manufacturing Diversity Jurisdiction by the Appointment of Representatives, 1 Villanova L. Rev. 201 (1956).

14. Stephan v. Marlin Firearms Co., supra note 13, applied *Corabi* to a guardian case without discussion. Contra: Martineau v. City of St. Paul, 172 F. 2d 777 (8 Cir. 1949).

The district courts in this Circuit have uniformly held *Corabi* applicable to guardianship cases. DiStephano v. Lehigh Valley Railroad Co., 258 F. Supp. 721 (E. D. Pa. 1966); see Johnstone v. O'Connor & Co., 164 F. Supp. 66 (E. D. Pa. 1958); Morris v. Bradley, 139 F. Supp. 519 (E. D. Pa. 1956). See also Fallat v. Gouran, 220 F. 2d 325, 327 n.2 (3 Cir. 1955). See Berkowitz v. Philadelphia Chewing Gum Corp., 317 F. 2d 192, aff'g per curiam 217 F. Supp. 80 (E. D. Pa. 1962), and compare with the earlier phase of the same case in 303 F. 2d 585 (3 Cir. 1962).

Section 1359 is a combination in simplified form of the old anti-assignment statute (28 U. S. C. § 41(1)(1940 ed.)) derived from § 11 of the Judiciary Act of 1789,[15] with the separate provision originating in the Act of March 3, 1875 [16] and later incorporated as § 37 of the Judicial Code of 1911. (28 U. S. C. § 80 (1940 ed.)) In combining these two provisions the reviser intended no alteration in the meaning of the latter one which empowered the district court to dismiss a suit "at any time . . . [when] such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removeable. . . ." The revisor's note to § 1359 states: "Provisions . . . for dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of a district court were omitted as unnecessary [because] . . . any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion."

While the preliminary words of the provision no longer appear in § 1359, we believe they give content to its otherwise indefinite and ambiguous words "improperly" or "collusively". They say in effect that a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named.

The impropriety or collusion is not any conduct between the plaintiff and the defendant, for as Chief Judge Biggs pointed out in **Corabi**, the defendant may even oppose the guardian's prosecution of the action. The collusion exists between the nonresident guardian and the applicant for his appointment in the state proceeding as a result of which one

15. Act of September 24, 1789, ch. 20 § 11, 1 Stat. 73.
16. Ch. 137, § 5, 18 Stat. 470.

who would not otherwise have been named as guardian has achieved the status from which he claims the right to sue because of his artificial selection solely for the purpose of creating jurisdiction. He is not chosen because of his capacity to manage the property of his ward, and indeed need have no experience in the management of property. He is outside the jurisdiction of the court which is to supervise his nominal activity. In truth none of the considerations which normally lead to the selection of a guardian affect the local appointing court's determination because it knows that in the "manufactured" diversity case the guardian is not expected to manage any property for his supposed ward and usually will not continue in office or exercise any real function after any funds are recovered in the litigation. He is no more than a representative of the minor's counsel whom counsel provides in order to establish a diversity of citizenship which will permit him to bring the action in the federal court. As a straw party he does not stand in the position of a true fiduciary whose involvement in litigation is incidental to his general duty to protect the interests of those for whom he is responsible.

The multiplication of "manufactured" diversity cases is a reflection on the federal judicial system and brings it into disrepute. Efforts therefore have been made to remedy the evil by legislation recommended by the judicial Conference of the United States,[17] and the American Law Institute in its recent study of the division of jurisdiction between the state and federal courts has recommended a statute which would test diversity in all cases by the citizenship of the beneficiary or the decedent rather than the personal representative.[18] There would be no need for such legislation in

17. See 1959 Report of Judicial Conference of United States, p. 8. A bill carrying out this recommendation was introduced by the Chairman of the House Committee on the Judiciary in 1963, but was not acted upon. See H. R. 2832, 88th Cong., 1st Sess.

18. American Law Institute, Study of the Division of Jurisdiction Between the State and Federal Courts, Part I, Proposed § 1301(b)(4) (Official Draft 1965).

"manufactured" diversity cases but for the interpretation of § 1359 in our leading case of **Corabi**, and similar decisions.

We believe on reconsideration that § 1359 is not so limited in scope as was held in **Corabi**,[19] especially when read in the full background of the language of its predecessor provision originating in the Act of 1875. Further light is supplied by the construction long given to the anti-assignment provision which is now also incorporated in § 1359. It is well settled that the anti-assignment provision of § 1359 bars the creation of diversity jurisdiction by the transfer of a right of action to a collection agent whose only interest in prosecuting the suit is the recovery of his fee, even though he is vested with a portion of the legal title and has been expressly authorized to sue on behalf of the beneficiaries.[20] The appointment of a fictitious guardian or representative selected by counsel for no other purpose than to create diversity jurisdiction in the action which will constitute the only asset in the estate is not substantially different from an assignment to an agent for the purpose of instituting litigation.

There are two obvious differences between the position of an assignee for the purpose of litigation and a straw fiduciary. In the former case there is an assignor in existence who might have sued in the state court in his own name, whereas in the case of an estate or a ward there is no one competent to sue prior to the appointment of a fiduciary. But since the appointee is in effect a straw party there is no reason why he should not be construed to come within the prohibition in § 1359 against invoking the diversity jurisdiction of a federal court by having one made a

19. In Carribean Mills, Inc. v. Kramer, 392 F. 2d 387, 393 (5 Cir. 1968), Judge Thornberry reviewing *Corabi's* analysis of § 1359 concluded that: "by focusing on the literal meaning of the two words ['improperly or collusively'] the court virtually emasculated the statute."

20. See Southern Realty Investment Co. v. Walker, 211 U. S. 603 (1909); Williams v. Nottawa, 104 U. S. 201 (1881); Carribean Mills, Inc. v. Kramer, 392 F. 2d 387 (5 Cir. 1968), following both earlier cases. See also Ferrara v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000 (D. Vt. 1967), aff'd on opinion below, 293 F. 2d 934 (2 Cir. 1968).

party improperly or collusively whether by assignment or otherwise. The second distinction in the case of a fiduciary is that he owes his position to a decree of a state court. We do not impugn this decree collaterally by refusing to recognize the citizenship of a straw guardian. Guardian he remains, but since he is acting in the capacity of a straw party we refuse to recognize his citizenship for purposes of determining diversity jurisdiction. His appointment may have authorized him to bring suit but his nominal status does not make his citizenship determinative for purposes of diversity. He occupies in effect the role of a guardian ad litem or a next friend or prochein ami whose function merely is to supply a party on the record responsible for costs (Bertinelli v. Galoni, 331 Pa. 73, 75, 200 Atl. 58, 59 (1938)), and whose citizenship would not be determinative of diversity jurisdiction.[21]

It has often been said that in judging whether diversity of citizenship exists the courts will not inquire into the motive which led to the appointment of the personal representative.[22] While, of course, the desire to obtain diversity jurisdiction is not in itself improper, nevertheless it is not irrelevant in the determination of the question whether the fiduciary is in fact a straw fiduciary whose citizenship is to be disregarded.[23] Moreover, it is difficult to see how motive can be entirely ignored in ascertaining the purpose for which the representative is selected in view of the language of § 1359. The statute outlaws the creation of jurisdiction where a party has been improperly or collusively made or

21. See Wright, Federal Courts § 29, p. 82 (1963); see also cases cited supra, note 7. The distinction between a next friend or prochein ami or a guardian ad litem and the guardian of the person or estate of a minor is an ancient one. See 1 Blackstone, Commentaries on the Laws of England, pp. *460-64 (1765).

22. See, e. g., Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 524 (1928); Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931).

23. See the careful analysis of Supreme Court authority in Ferrara v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000, 1011-12 (D. Vt. 1967), aff'd on opinion below, 393 F. 2d 934 (2 Cir. 1968).

joined to invoke the jurisdiction of the court. While the statute does not ban the appointment of nonresident fiduciaries, the artificial selection of a straw representative who has no duty or function except to offer the use of his citizenship to create diversity in contemplated litigation is a violation of its provisions. This is made clear by the knowledge that the appointing court normally would not have designated him because of his absence from the jurisdiction and the consequent limitation of its control over him, all of which can be put aside because there is at the time of appointment nothing for him to administer and he is not expected to exercise any real function.

In Jaffe v. Philadelphia and Western R. Co., 180 F. 2d 1010, 1013 (3 Cir. 1950), we relied heavily on Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931), for our holding that motive is irrelevant in the artificial creation of diversity jurisdiction. **Mecom** is immediately distinguishable from the present case because it involved an administrator, whereas here we deal with a guardian who does not have title to the ward's right of action. But we believe § 1359 reaches executors and administrators as well as guardians and therefore put this difference aside. The fundamental distinction between **Mecom** and the present case is that there the collusion statute was not involved because the resignation of the administratrix and the appointment of her successor were acts done not to create federal jurisdiction but to prevent it from attaching. Section 1359, as its language clearly shows, expresses a policy against the creation of federal jurisdiction and not against its avoidance.[24] It proscribes improper or collusive conduct "to invoke" diversity jurisdiction and hence was inapplicable in the **Mecom** case.

In **Corabi** we placed great weight on **Black & White Taxicab** for the irrelevance of motive. But the operative

24. 3 Moore, Federal Practice, p. 1320 (2d ed. 1948), quoted in *Jaffe*, 180 F. 2d at 1013. See also 3A Moore, Federal Practice, § 17.05 [3-3] 2d ed. 1968).

facts in **Black & White Taxicab** distinguish it from the present case. There a new corporation created to make diversity jurisdiction possible was not a mere straw. It became the sole party in interest after the old corporation was dissolved and all corporate assets were transferred to the successor. While the Court held that jurisdiction existed regardless of the motives of the management and shareholders of the corporation, it did so in the context of a real transaction which had significance beyond establishment of diversity jurisdiction. The Court in **Black & White Taxicab** therefore distinguished Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327 (1395) and Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293 (1908), which we recognized in **Corabi** might have been controlling but for the construction put upon the Act by the **Black & White Taxicab** case. In those two earlier cases, however, the manufacture of diversity jurisdiction by the creation of new corporations and the transfer of assets to them in order to make it possible for them to bring diversity suits in the federal courts was stricken down as collusive, under the then Act of 1875. The collusion, of course, was not with the defendant but among those having charge of the plaintiff's assets and the cause of action. Those cases were not overruled by **Black & White Taxicab.**

Since plaintiff invoked diversity jurisdiction the burden was upon her to prove all the facts by which it could be sustained.[25] Here plaintiff has added nothing to a record which shows on its face a naked arrangement for the selection of an out-of-state guardian in order to prosecute a diversity suit. It was early said in **Lehigh Mining & Mfg. Co.,**[26] quoted in **Miller & Lux:**[27] "But when the inquiry involves the jurisdiction of a Federal court—the presumption

25. See McNutt v. General Motors Acceptance Corp., 298 U. S. 178 (1936).
26. 160 U. S. at 336-37.
27. 211 U. S. at 302.

in every stage of a cause [is] . . . that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record." This is particularly true in diversity jurisdiction which trenches upon the jurisdiction of the state courts. As Mr. Justice Frankfurter said in Indianapolis v. Chase National Bank, 314 U. S. 63, 76-77 (1941): "The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts,' in order to keep them free for their distinctive federal business. [citations omitted] 'The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'"

In the present case not only was the straw guardian appointed solely to create diversity jurisdiction, but the controversy itself is essentially local, and one of the reasons underlying diversity jurisdiction, the prevention of discrimination against out-of-state litigants,[28] is completely absent. The accident occurred in Pennsylvania, where the injured minor and all the defendants reside and have their citizenship.

We hold therefore that the attempt to confer diversity jurisdiction in the present case offends against § 1359. Jaffe

28. See Lumberman's Mutual Casualty Co. v. Elbert, 348 U. S. 48, 54 (1954), Frankfurter, J., concurring.

and Corabi are hereby overruled, and Fallat v. Gouran is disapproved to the extent that it indicates approval of "manufactured" diversity. Whether in an individual case diversity jurisdiction is "manufactured" is, of course, a question of fact. Here "manufactured" diversity is conceded, but in other cases where it is not conceded it will be for the district court to make the factual determination.

In the present case the accident giving rise to the cause of action occurred on November 27, 1966 and under the governing Pennsylvania law the statute of limitations will not expire until two years from that date.[29] Since an action may still be instituted in the state court within the period of the statute of limitations, there is no reason to withhold application in the present case of the rule here announced. The pendent claim has no independent basis for jurisdiction and cannot attach to the main action which falls because the diversity of citizenship was artificially created.

It follows, therefore, that the judgment from which Mrs. Fritzinger has appealed must be affirmed.

We recognize that many actions are now pending in the courts of this circuit in reliance on our earlier decisions. In many of these actions the statute of limitations may already bar the institution of new suits in the state courts although in some of them protective state court actions may have been filed. To apply the rule we have here announced to all pending and future actions indiscriminately would work great hardship on those who have relied on our prior recognition of artificial diversity jurisdiction. It is therefore appropriate to declare the new rule to be prospective.

It is true that we deal here with a jurisdictional question. But the notion that "jurisdiction" is a subject of some magical quality so that a decision against jurisdiction

29. Act of June 24, 1895, P. L. 236, § 2, 12 Purdon's Pa. Stat. Annot. § 34.

prevents according recognition to other relevant considerations must yield to the knowledge that it is our construction of the statute which determines in the present case whether jurisdiction exists or is absent. The Supreme Court relatively early recognized prospective overruling as a judicial technique of general application (Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U. S. 358 (1936)), and recently has restricted to prospective application some of its decisions on questions of constitutional law, an area long considered as much immune from prospective overruling as the area of federal jurisdiction. As we had occasion to say in Hanover Shoe Inc. v. United Shoe Machinery Corp., 377 F. 2d 776, 789 (3 Cir. 1967), reversed on other grounds, 392 U. S. 481 (1968): "Recent decisions of the Supreme Court in criminal cases have made it clear that the unrealistic theory that the law has always been what the latest case for the first time declares it to be, the so-called Blackstonian view, must yield to the practical realization that conduct had occurred in reliance on the earlier rules of law to the contrary."[30]

We hold, therefore, that the overruling of the doctrine of **Corabi** shall take effect as follows: It shall apply to all causes of action which arise after the date of the filing of this opinion. In cases involving causes of action which arose prior to such date, including cases now pending, a district court shall apply the new rule against artificially created diversity, either on motion of a party or sua sponte,

30. The footnote to this statement in *Hanover* reads as follows: "Thus, e. g., retroactivity was refused to be accorded in Linkletter v. Walker, 381 U. S. 618 (1965), to Mapp v. Ohio, 367 U. S. 643 (1961), dealing with illegally seized evidence; in Tehan v. United States ex rel. Shott, 382 U. S. 406 (1966), to Griffin v. State of California, 380 U. S. 609 (1965), dealing with comment on the failure of a defendant in a state criminal trial to take the stand; in Johnson v. State of New Jersey, 384 U. S. 719 (1966), to Escobedo v. Illinois, 378 U. S. 478 (1964) and Miranda v. State of Ariz., 384 U. S. 436 (1966), dealing with custodial police questioning of criminal suspects. See also Butcher v. City of Philadelphia, 380 Pa. 290, 110 A. 2d 349 (1955)." Ibid. at 789.

Since Hanover the Supreme Court has reiterated this view. See Stovall v. Denno, 388 U. S. 293 (1967); DeStephano v. Woods, 392 U. S. 631 (1968).

if it is conceded by the parties or the court finds as a fact that diversity was artificially created, but only where the court finds that in the circumstances of the particular case there is ample time and opportunity for the plaintiff to institute a new action in the state court and that no unreasonable burden will be imposed on the plaintiff by the dismissal of the federal action.

The judgment of the district court will be affirmed.

Dissenting Opinion By Cir. J. McLaughlin

The District Court here properly confined our applicable out of state administrator rule to the administrator's action and barred the joining with it of a non-diversity suit as a matter of right under the cover of the administrator claim. That was the only question before us from the District Court on this appeal. I would affirm the judgment of the District Court solely on that point and as decided by the District Court. I dissent from the views expressed by the majority opinion.

Dissenting Opinion By Cir. J. Kalodner

In the instant case one Stella McSparran, a resident of New Jersey, was appointed guardian by a Pennsylvania court, to prosecute a personal injury claim for Richard R. Riegner, a minor, against the defendants Weist and Millard. The minor and the defendants are Pennsylvania citizens and the guardianship was designed to create diversity of citizenship jurisdiction. The guardian filed this action in the Eastern District of Pennsylvania for damages accruing to the minor, and the latter's mother, Martha M. Fritzinger, a Pennsylvania citizen, joined in the action in her own right seeking out-of-pocket medical expenses.

The sole issue presented in the District Court was whether a parent who lacks diversity may join, as a matter of right, in the created diversity suit of a minor child. The District Court held that the doctrine of pendent jurisdiction did not grant a "right" to the mother to prosecute her independent claim in the prevailing circumstances, viz., the "artificial" diversity jurisdiction, and dismissed her claim for "lack of diversity."

The only issue presented by the parties on this appeal was whether the District Court erred in dismissing the mother's independent claim for damages for the season it assigned. The majority has seen fit to side-step the issue presented and to affirm the District Court's disposition solely on the threshold ground that the "manufactured" diversity jurisdiction of the guardian's action in behalf of the minor "offends against § 1359", 28 U.S.C.A., overruling our prior decisions to the contrary.

I dissent from the majority's holding that § 1359 forbids "manufactured" diversity jurisdiction, for the reasons stated in Judge Biggs' dissent in Esposito v. Emery, today decided.

I am further of the opinion that the District Court had pendent jurisdiction with respect to the mother's independent claim and would reverse the District Court's ruling to the contrary. Borror v. Sharon Steel Co., 327 F.2d 165 (3 Cir. 1964); Newman v. Freeman, 262 F. Supp. 106 (E. D. Pa., 1966). See, too, Wilson v. American Chain & Cable Company, Inc., 364 F.2d 558 (3 Cir., 1966).

For the reasons stated I would reverse the Order of the District Court dismissing the action of Martha M. Fritzinger, in her own right, for lack of diversity jurisdiction.

ESPOSITO v. EMERY

Majority Opinion

After submission to a panel we ordered this appeal to be argued before the court en banc with McSparran v. Weist in order to review the jurisdictional question which we raised sua sponte,[1] where diversity of citizenship is created or "manufactured" by the appointment of a non resident guardian of a minor, selected solely for the purpose of creating diversity.

On January 3, 1962, David J. McClintock, Jr., a seven-year old second grade pupil at the Unionville, Pennsylvania, Elementary School, was seriously injured when a bank of school lockers toppled over on him as he tried to open one of them.

A year later the boy's parents with whom he resided in Pennsylvania petitioned the Orphans' Court of Chester County, Pennsylvania, to appoint Dominic A. Esposito, a resident of Wilmington, Delaware, a guardian of the minor's estate. Their petition expressly averred that "a Guardian is necessary for the Estate of the minor so that suit may be brought in the United States District Court for the Eastern District of Pennsylvania to recover for injuries received by the minor as the result of an accident on January 3, 1962." The petition also averred that the claim, "for which suit will be brought in the United States District Court for the Eastern District of Pennsylvania", was the "sole asset of the estate of the minor." Solely on the basis of the petition the Orphans' Court on January 18, 1963, appointed Esposito as "Guardian of the property of the Estate of David J. McClintock, Jr., without the necessity of

1. Defendants in their answer alleged that the court was without jurisdiction "because of the lack of genuine diversity between minor plaintiff and defendants." They did not press this defense, however, either in the court below or in their original briefs on appeal.

filing bond, until such time as assets shall be received by said guardian."

Shortly thereafter Esposito brought the present action for negligence in the district court against the principal, the assistant principal, the director of administrative services and the janitor of the school, but recognizing its immunity, did not join the school district itself as a defendant. The individual defendants sought summary judgment on the ground that they too were immune from suit for conduct within the scope of their authority as employees of the school district. Their contention was rejected by the district court, 249 F. Supp. 308 (E.D.Pa. 1965). In the course of the ensuing jury trial the director of administrative services and the assistant principal were dismissed as parties and the case was submitted to the jury against the two remaining defendants. The jury was unable to agree on one of the questions submitted in special interrogatories, but the court later granted the motion of defendants for judgment on the whole record on the ground that there was no evidence of negligence on their part. 266 F. Supp. 219 (E.D.Pa. 1967). Plaintiff thereupon took this appeal.

It is conceded that the present case is one of artificial or "manufactured" diversity in which an out-of-state guardian was appointed solely for the purpose of creating an apparent federal jurisdiction. As in McSparran not only was the straw guardian appointed solely to create diversity jurisdiction, but the controversy itself is essentially local, and one of the reasons underlying diversity jurisdiction, the prevention of discrimination against out-of-state litigants,[2] is completely absent. The accident occurred in Pennsylvania where the injured minor and both the defendants reside and have their citizenship. Moreover, the artificial

2. See Lumberman's Mutual Casualty Co. v. Elbert, 348 U. S. 48, 54 (1954), Frankfurter, J., concurring.

creation of diversity here cast upon the federal courts the necessity to decide as a matter of first impression an important question of Pennsylvania policy—the immunity of school district officials for torts committed in the performance of their duties, a question in which there is no federal interest and which it would have been preferable for the state courts themselves to decide.

The case, therefore, is ruled by McSparran v. Weist, decided this day, holding that artificially "manufactured" diversity is insufficient to create federal jurisdiction, although Judge Van Dusen who sat at the rehearing en banc has since disqualified himself from participating in the disposition of this case and the remaining members of the court who sat at the rehearing are evenly divided as to the correctness of the McSparran ruling.

The accident in this case occurred on January 3, 1962, and Pennsylvania's two-year statute of limitations has long since expired. As we pointed out in McSparran it would be harsh to apply our new rule retrospectively to a case such as this, in which the plaintiff's rights would be lost because the statute of limitations bars the maintenance of a new suit in the state court.

We therefore have considered the merits of the case. After examining the evidence we are unanimous in finding it inadequate to establish any negligence by the individual defendants.

The judgment of the district court will be affirmed.

Kalodner, Circuit Judge, concurs in the result on the merits of the case, but dissents from the majority view with respect to the issue of "manufactured" diversity jurisdiction for the reasons stated in Judge Biggs' dissenting opinion.

Opinion By Cir. J. Biggs, Dissenting in Part and Concurring in Part

As a Senior Circuit Judge, 28 U.S.C. § 371(b), I was not qualified to vote for rehearing or sit at the rehearing in McSparran, et al. v. Weist, et al., at our No. 16793, a "companion" case to the instant case, for I did not sit at the original argument in McSparran. App. Rule 35, 43 F.R.D. 101, and 28 U.S.C. § 46(c). Nonetheless, I think I am entitled to state and I do state that what is said in the dissenting portion of this opinion is in all substantial respects equally applicable to the majority's McSparran opinion.

I believe the law as to the application of 28 U.S.C. Section 1359 was stated correctly by this court in Jaffe v. Philadelphia & Western R. Co., 180 F. 2d 1010 (1950), in Fallat v. Gouran, 220 F. 2d 325 (1955), and in Corabi v. Auto Racing Co., 264 F. 2d 748 (en banc, 1959). I shall not repeat generally here what was said in those opinions. I do desire, however, to point out what appear to me to be grave weaknesses in the majority opinion in respect to the application of Section 1359.

The majority opinion states that Jaffe and Corabi are overruled and that Fallat v. Gouran is disapproved to the extent that it indicates approval of "manufactured" diversity, but the court's reasoning for its rulings goes far beyond this and will lead, in my opinion, to substantial difficulties. The majority opinion states: "We are not here concerned, however, with the capacity to sue under Rule 17, nor with the question whether the fiduciary is the real party in interest. Our problem is whether for purposes of diversity jurisdiction we should look to the citizenship of the representative, here the guardian of the estate of the minor, or to the person on whose behalf he acts." The language quoted indicates that the court cares not whether the suit be brought by the real party in interest

or not and therefore the court's decision is equally applicable to cases where the plaintiff is the trustee of an express trust, of a resulting trust, or even of a trust **ex maleficio**, an administrator, a **prochein ami**, or any other type of fiduciary.

The reasoning and the rulings of the majority seem to turn on the statement: "Here plaintiff [Esposito] has added nothing to a record which shows on its face a **naked arrangement** for the selection of an out-of-state guardian in order to prosecute a diversity suit." (Emphasis added). The condition of a "naked arrangement" as a bar to the application of Section 1359 will prove, I think, most troublesome. The primary purpose of the "arrangement" in the case at bar, as in Jaffe v. Philadelphia & Western R. Co. 180 F. 2d 1010, 1011 (1950),[1] was to collect a judgment and it probably was concluded by counsel for the widow in Jaffe that a larger judgment could be obtained in a federal court or that the case could be more expeditiously tried there. But what would be this court's ruling in a suit brought by the **cestuis** of an **inter vivos** trust where the donor had appointed an out-of-state fiduciary because he wished the **cestuis** to be able to maintain a diversity suit in a federal court? Would the donor's purpose be any more or less "naked" than that of the persons who petitioned the Orphans' Court to appoint Esposito? I think the answer would have to be in the negative. Moreover, under the circumstances which surround the case at bar and cases like it, can it be said that a trustee under an express trust is any more or less naked in interest than a **prochein ami** or an administrator or an executor? I believe the answer would have to be "No".

1. In Jaffe v. Philadelphia & Western R. Co., 180 F. 2d 1010, 1011 (1950), it was said: "*Primarily* because it was desired to bring the matter in the federal court, a stenographer in the office of the widow's attorneys, who is a New Jersey resident, was appointed administratrix *ad prosequendum* of the deceased's estate." (Emphasis added, first instance).

If, as the majority opinion states, the issue of who is the real party in interest has no weight (which I believe to be a correct statement of the law), then does not the majority disregard the decision of the Supreme Court in B. & W. Taxi Co. v. B. & Y. Taxi Co., 276 U.S. 518 (1928)? Mr. Justice Butler decided that Section 37 of the Judicial Code of 1911, the precursor of Section 1359, was not applicable where a Tennessee corporation had been purposely created and a cause of action assigned to it with other assets by a Kentucky corporation, for the express purpose of creating or "manufacturing" diversity jurisdiction. Mr. Justice Butler said, **id. supra** at 785, that Section 37 was inapplicable because **"The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction. M'Donald v. Smalley, et al., 1 Pet. 620, 624. It is enough that respondent is the real party in interest."** (Emphasis added). What palpable difference is there between having a **single** asset transferred by operation of law to the guardian of the estate of a minor and having **all** assets of one corporation transferred to another corporation by action of a board of directors and, probably, stockholders? The former is said to demonstrate a "naked" purpose to create diversity, while the latter does not. The first is said to be lacking in propriety and collusive to boot; the second, in the view of a majority of this court is proper and non-collusive. This means a mere exercise in semantics.

In Necom v. Fitzsimmons Drilling Co., 284 U. S. 183 (1931), the widow of the decedent who had been appointed administratrix resigned, and upon her request Mecom was appointed administrator. The purpose of Mecom's appointment was **to avoid and not to create diversity of citizenship.** But Mr. Justice Roberts cogently stated, **id.** at 189: **"To go**

behind the decree of the probate court would be collaterally to attack it, not for lack of jurisdiction of the subject matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they have practiced no fraud upon it." (Emphasis added). The ruling of the majority is a collateral attack on the decree of State probate courts and as such should not be permitted. Cf. the provisions of Section 1738.[2] See also Klaxon Co. v. Stentor Co., 313 U. S. 487 (1941), which would seem to require the application, at least by analogy, of the principles of the full faith and credit clause. Article IV, Section 1 of the Constitution. Moreover, there is assuredly no fraud asserted in the case at bar and particularly it must be borne in mind that Rule 17, Fed. R. Civ. Proc., 28 U.S.C. as the majority concedes, authorizes Esposito to bring the suit as a party plaintiff.

But in ascertaining what is a "naked arrangement", would not the United States district court in almost every case, at its peril and at the peril of the litigants, have to determine what the purpose, "naked", "primary", or otherwise, which caused or prompted someone on behalf of some kind of fiduciary to bring suit in the United States court? And would this not require in almost every instance the taking of evidence and an examination not of objective but of subjective criteria, i.e., what was in the mind of the person or persons who moved in Orphans' Court or any probate tribunal to appoint an out-of-state executor or administrator? Would not the district court have to weigh a fact of the sort presented by a case like Fallat v. Gouran, **supra**, where the daughter of the injured person brought the suit? Is it collusive or improper for a daughter to serve as guardian

2. "Such . . . judicial proceedings [of State tribunals] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state. . . ."

of her mentally ill father? I would say "No" but others might say differently, and findings of fact as well as conclusions of law would probably have to be made by the trial court in most of these cases. While purporting to abolish the "manufacture" of diversity jurisdiction, the majority rule would elevate such manufacturing to an art difficult to define and even more difficult to combat.

What we were at pains to state in Corabi, **viz.**, that there is nothing collusive or improper in openly going before a State court on a petition which is a public record to have an out-of-state fiduciary appointed, whether that be with the thought of obtaining a larger judgment or to avoid delays of some of our State courts, applies here with equal force. The majority engrafts a novel, and I think an illegal, gloss on Section 1359. I believe that the majority decision will open a fertile field for perjurious testimony and lead to great uncertainty.

I must respectfully dissent from the majority view on the issue of "manufactured" diversity. I concur in the result reached by the majority because under the facts of this case and the law of Pennsylvania, Esposito has not presented a cause of action upon which relief can be granted.

I can perceive no necessity to express any view in this dissenting opinion in respect to the very troublesome issue of prospectivity.

McLaughlin, Circuit Judge, concurs in the opinion of Judge Biggs herein.

EXHIBIT II.

"(Bill No. 1524.)

AN ORDINANCE

Amending Title 21 of The Philadelphia Code by adding Chapter 21-700, providing for a waiver by the City of governmental immunity from suit, under certain terms and conditions.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Title 21 of The Philadelphia Code is amended by adding Chapter 21-700, as follows:

TITLE 21 MISCELLANEOUS

* * *

CHAPTER 21-700: WAIVER OF GOVERNMENTAL IMMUNITY

§ 21-700 Acts of City Employees.

(a) Any person sustaining bodily injury or death caused by the negligence or unlawful conduct of any employee of the City, while the employee is acting within the scope of his office or employment, shall have the right to bring suit against the City in accordance with the same rules of law as applied by the Courts of this Commonwealth against any other party defendant. In such suits the City shall not plead governmental immunity as a defense.

(b) Nothing contained herein shall be construed to repeal or modify the Workmen's Compensation Laws.

Explanation:
Italics indicate new matter added to existing ordinance.

CERTIFICATION: This is a true and correct copy of the original Ordinance approved by the Mayor on February 8, 1962.

NATHAN WOLFMAN
Chief Clerk of the Council"

APPENDIX I.

LETTER TO COUNSEL 11/9/67.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Chambers of
A. Leon Higginbotham, Jr.
Judge
2110 United States Courthouse
Philadelphia, Pa. 19107
WAlnut 5-0363

November 9, 1967

Joseph J. Murphy, Esquire
1525 Two Penn Center Plaza
Philadelphia, Pa. 19102

Re: Ellen Hennigan, Admx. of Est. of James C. Hennigan, Dec'd. v. Atlantic Refining Co. and City of Phila. C. A. No. 32433

Bonnie Riddick, Admx. of Est. of John Riddick, Dec'd. v. Atlantic Refining Co. and City of Phila. C. A. No. 33306

Roger A. Johnson, Admr. of Est. of Robert C. Wilson, Dec'd. v. Atlantic Refining Co. and City of Phila. C. A. No. 32928.

Dear Mr. Murphy:

It has been brought to my attention that inadvertently an uncorrected stenographic copy of the opinion may have been circulated to you or some of the other counsel. As a

result, the stenographic corrections may not have been made on the copy which you received. I have today filed an amended opinion which merely notes these stenographic corrections and which I would appreciate your using for purposes of appeal as the final opinion in issue.

Very truly yours,

A. LEON HIGGINBOTHAM, JR.
A. Leon Higginbotham, Jr.

cc: All counsel of record
Clerk, U. S. District Court
Clerk, U. S. Court of Appeals, Third Circuit.

APPENDIX II.

ORDER (IN ALL CASES).

It has been noted that by inadvertence the rough draft of this opinion which had not been corrected for stenographic errors was distributed.

The attached is the amended copy of the opinion which does not change in substance any concepts expressed in the prior opinion. This amended opinion is filed for the convenience of counsel since an appeal has been filed so that it may be used in lieu of having an errata sheet filed.

By THE COURT:

A. LEON HIGGINBOTHAM, JR., *J.*

Dated: November 9, 1967.

APPENDIX III.

AMENDED OPINION (IN ALL CASES).

Higginbotham, *J.* November 9, 1967

I.

These cases were consolidated and tried to a jury which returned verdicts in favor of each of the three plaintiffs in their actions against defendant, City of Philadelphia, (hereafter called the "City"), and against each of the three plaintiffs in their actions against defendant, Atlantic Refining Company (hereafter called "Atlantic"). In accordance with findings of the jury as expressed in answers to special interrogatories,[1] judgment was entered in favor of each of the plaintiffs against the City and against the City in its cross-claim against Atlantic.

The City now moves for judgment notwithstanding the verdict, or in the alternative, for a new trial. In addition, the City seeks an order crediting it with the amount paid to the plaintiffs as workmen's compensation and the amount paid to the plaintiffs by Atlantic, pursuant to a settlement.

Atlantic has also moved for judgment on its cross-claim against the City for the amount paid by it to plaintiffs pursuant to the settlement, plus costs and reasonable attorneys' fees.

Jurisdiction was based on diversity of citizenship, and therefore Pennsylvania law is to be applied.

After careful consideration of the myriad claims of the City—both individually and cumulatively—I find no basis for granting the relief sought by those claims. Since this case could have been settled for considerably less than the amount of the verdicts, counsel for the defendant, City

1. See Appendix.

of Philadelphia, in a manner of seeming desperation has now saturated the Court with 76 claims in support of his motions. He has synthesized within his motions matters of utter irrelevance, frivolousness and insignificance. This "shotgun" approach makes it difficult for any Court to discern whether any of the pellets sprayed by defendant may, even inferentially have some substance. Nevertheless, in view the magnitude of the total verdicts—*$464,300.00*—I am attempting to answer those issues which probably have the most relevance. With respect to the scores of other conglomerate allegations urged by the City's counsel, I have found that these assertions individually and cumulatively are without merit; however, I have refused to discuss each of counsel's conglomerate claims since it would require an unnecessary extension of this present 43 page opinion.

II.

Facts.

Each of the three decedents was employed by the Driscoll Construction Company (hereafter called "Driscoll" or "contractor") on the work of constructing a sewer for the City. The project was to run under 26th Street between Penrose Avenue and Passyunk Avenue, adjacent to Atlantic's "tank farm". Construction was to be by the tunnel method. At 8:00 A. M., August 22, 1962, the decedents entered the tunnel at shaft 5 to begin their work. Approximately 15 minutes later there was an explosion and fire in the tunnel adjacent to that shaft and all three men were killed. A fourth workman, Mr. Gregory, was also killed in this accident. However, his estate did not file suit in the Federal Court.

The plans and specifications for the sewer project were drawn by the Design Division of the City's Water Department (N. T. 90-103, 1398-1400). It was their decision that

it be done in tunnel rather than by open trench method (N. T. 155). Pursuant to this design, the water table ran through the tunnel (N. T. 151). Prior to the time the contract was let, the City knew the soil in the area was coarse and porous (N. T. 151-152; 1435). The City also had extensive prior knowledge that the ground in the area was likely to be saturated with hydrocarbons (i.e. petroleum products) (N. T. 1456, 2198; City's Answers to Riddick interrogatories 1 and 12, and to Hennigan interrogatory 19), and that they were likely to be encountered at the water table (N. T. 517, 518, 1326-36, 1430, 1441-43, 1456).

The contract specifications required that an inspector from the Construction Division of the Water Department be at the job site at any time work was being done. It was his primary responsibility to see that the plans and specifications were followed (N. T. 461, 1485, 1444). These plans and specifications included a requirement that the contractor comply with the regulations of the Bureau of Mines, Explosives and Quarries of Department of Labor and Industry of the Commonwealth of Pennsylvania (N. T. 2188-2189). Each inspector was provided, by the Water Department with a copy of the "Guide for Inspectors" (Exhibit P-36), and it was gone over in detail with them. It was prepared under the direction of Water Commissioner, Samuel Baxter (N. T. 2188), and was intended as ". . . a bible for their inspections." (N. T. 461). Included among the duties of the inspector set out in the "Guide" are detailed instructions concerning both the manner of work and the safety of the workmen.[2]

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2. (Page citations are to the pages of the Guide.)
Clause G-6 "The prime duty of an Inspector is to see to it that the work to which he is assigned is carried out in strict compliance with the Plans, the Proposal and all of the City Standard Specifications and Standards. This includes checking all of the materials used. The Inspector should understand the reasons for the various requirements of the Specifications and should consult his immediate superior if in doubt. . . ." (p. 8).

Both Commissioner Baxter and Mr. Samuel Wilson, Chief of the Water Department's Construction Division, testified that the Inspector had a definite responsibility for the safety of the workmen, and that the Inspector could order a job, or a portion thereof, stopped to protect the safety of the employees as well as to insure compliance with other specifications (N. T. 475, 485, 2190, 2194, 2196. See also testimony of Mr. M. J. Driscoll, N. T. 1774-75).

Prior to the date of the accident, the log book of the Contractor, (Exhibit P-83) showed, inter alia, the following entries:

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2. (continued)

Clause G-8 "The Inspector is responsible for any failure on the part of the contractor to conduct the work in accordance with the Plans and Proposals, City Specifications and Standards. It is the duty of the Inspector to immediately call to the attention of the Contractor's representative any failure to comply with the requirements. If the Contractor refuses or fails to correct the work, the Inspector should stop this portion of the work and he should report the trouble promptly to his immediate superior." (p. 9).

Clause G-9 One of the important duties of every Inspector is to be constantly alert to protect the public and the employees of both the City and the Contractor against accidents. . . .

"The Inspector . . . should be particularly careful for the safety of all men in tunnels, . . .

". . . Safety . . . should be in mind every time the Inspector goes the rounds of his job." (p. 11).

Clause G-12 "The Inspector assigned to a construction contract must have in his possession on the job, and be thoroughly familiar with, the City's Standard Contract Requirements, all of the Standard Specifications pertaining to his work, and the Plans and Proposal covering his assignment. On sewer contracts he must also have a copy of the Standard Details for Sewers. . . . In these Standards will be found the answers to many of the problems with which the Inspector will be confronted. They should be studied frequently and thoroughly." (pp. 13-14).

Clause E-36 ". . . When the proposal calls for tunnel construction . . . it is of particular importance that the Inspector be familiar with all of the Special Provisions in the Proposal, as well as the Commonwealth of Pennsylvania's Regulations for Tunnel Construction and Work in Compressed Air, referred to in Clause E-32 of this pamphlet . . ." (pp. 27-28. See also Clause E-32, p. 24).

". . . The Inspector should see to it that the Contractor uses every reasonable precaution to insure the safety of the workmen . . ." (p. 28).

In addition to the above, Clause E-36 (p. 27) and Clause S-57 (pp. 47-48), for example, provide for situations where the Inspector believes that that actual work should be done in a manner differing from the strict language of the Plans and Specifications.

May 17: ". . . gas very strong."

May 18: ". . . gas very strong."

May 22: ". . . gas bad."

May 24: ". . . hit gas at 15 feet."

May 28: ". . . oil, water and gas very bad."

May 29: ". . . gas very very bad."

June 7: ". . . hit water, gas and oil at 30 feet."

June 13: ". . . set up and used 14 inch blower. Gas not too bad with same."

June 16: ". . . Gas and oil in shaft caught fire with one spark from torch. . . ."

June 27: ". . . Need three blowers."

July 6: ". . . Gas too bad. Pull everything out of hole and move to Number 6 shaft."

July 7: "Gas about one foot in bottom of tunnel."

July 12: "Using large blower . . . and also gas masks."

July 13: "Shut down number 5 and 6 shafts for a few days to see if there is a solution to the gas problem."

August 4: "Shaft has plenty of gas."

August 20: ". . . fumes strong."

On June 8, 1962, the City's Inspector on the job sent a "Rush Sample" (N. T. 418) of liquid taken from shaft 7 to the Water Department's Materials Testing Laboratory, requesting that it be tested for poisons and explosive possibilities (N. T. 353-359, 361, 392, 396). Because of the highly inflammable nature of the substance revealed by the initial

tests, an immediate report was made by telephone (N. T. 367-68). In the formal report, sent to the Construction Division eleven days later, the sample was said to be petroleum products having an "ignition point at room temperature." (N. T. 361-62; 366-69).

Had this report been made known to the Chief of the Construction Division, the entire job would have been stopped to find out if the condition existed elsewhere and if something could be done (N. T. 475).

Moreover, the reasonable and appropriate practice to be followed in the industry, as stated by the Chief of the Bureau of Mines, Quarries and Explosives of The Commonwealth of Pennsylvania, would have been to vacate the tunnel and shut down the job as soon as the inspector became aware of the presence of explosive vapors in the tunnel. Anything that could have caused a spark should have been removed and the job should not have been reopened until the tunnel had been properly ventilated (N. T. 855, 859-62).

Despite all of this warning about the danger of fire and explosion, and despite the daily and continuous presence of the City's Inspector, the Contractor continued to use, in the tunnel:

(1) Steel muck carts on steel tracks, (N. T. 630);

(2) An unsealed, non-explosive type electric sump pump, (N. T. 631-32, 661);

(3) Steel tunnel bolts, (N. T. 631);

(4) Unsealed electric plugs, (N. T. 662);

(5) Taped electric wire with "homemade" splices, (N. T. 659-60, 737);

(6) Non-explosive-proof electrical fittings, (N. T. 839, Exhibit P-77);

(7) Metal wire to hold cable to metal tunnel liner plates (N. T. 665, 667, 859);

(8) Unguarded electric light bulbs (N. T. 661-62, 751-52).

III.

Plaintiffs contended that the City was negligent with respect to *both* their design of the sewer, including the drawing up of plans and specifications, and, separately and in addition, the manner in which the City exercised the control which it retained over the manner and method of the work. Following the appropriate suggestion of the Court of Appeals for this Circuit, as to the advantages of submitting factual interrogatories to the jury, pursuant to Rule 49, F. R. C. P., separate instructions and separate interrogatories were given to the jury for the issues concerning design and for the issues concerning control. In this way, if any errors were committed on any one phase, and if there was a separate and independent ground on which liability could be predicated, the Court of Appeals will have the advantage of specific findings, and thus not be forced to order the retrial of the entire case. See *Albergo v. Reading Co.*, 372 F. 2d 83, 86 (3rd Cir., 1966); *Pritchard v. Liggett & Meyers Tobacco Co.*, 370 F. 2d 95 (3rd Cir., 1966); *Cate v. Good Brothers*, 181 F. 2d 146, 148 (3rd Cir., 1950). These separate findings are of particular importance in this case, since from my view, as from the jury's view, the evidence totally preponderates in establishing the negligence of the City both in the manner in which it designed the project—in placing the tunnel at the water table, in an area in which the soil was permeated with petroleum products, without establishing appropriate and explicit standards for assuring safe working conditions—*and also*

in the manner in which it exercised that control which it retained through its contract with Driscoll.

A. Design of the Sewer.

With respect to the design of the sewer, the City knew or should have known:

(1) The project site was adjacent to a petroleum tank farm;

(2) There was likely to be petroleum in the soil at such a site;

(3) The porous soil at this project site was conducive to the continuous and rapid flow of water and other liquids;

(4) Petroleum floats on water;

(5) Petroleum products vaporize in air readily;

(6) Petroleum vapors may be ignited readily by sparks from any source, and if mixed with a certain percentage of air, will then explode;

(7) The project went through the water table.

In spite of their knowledge of these factors, which rendered their work in this tunnel particularly susceptible to fire and explosion, the City's Design Department failed to specify particular precautions to be taken to minimize the danger, or in the alternative, to avoid going through the water table at this site. Thus, the jury's finding that the City was negligent with respect to the design of the sewer is clearly supported by the evidence.

B. Control by the City.

Counsel for the City urges the Court to hold that, as a matter of law, having retained a competent independent

contractor, the City is not liable for any injury to the contractor's employees caused by—it is argued—the negligence of the contractor.

So phrased, the argument misconstrues the theory put forth by the plaintiffs which is that the City did retain control of the manner of operation by the contractor, that in the exercise of that control they were negligent and that that negligence was a proximate cause of the accident in which the decedents were killed. Support for plaintiffs' position is found in the decisions of the Pennsylvania Supreme Court and of the Court of Appeals for the Third Circuit as well as in the Restatement of Torts.[3]

1. *Authority.*

In *Stork v. Philadelphia,* 199 Pa. 462 (1901), a landowner sued the City for damage to property caused when the adjacent ground gave way due to faulty shoring in the construction of a subway for the City by Flynn, an independent contractor.

> ". . . It appeared that the City retained the right to determine when an underpinning or shoring up of foundations should be done. The City refused to authorize the shoring up of the plaintiff's house, when the excavation was first made, and this resulted in serious damage to the property.
>
> "The undisputed evidence shows that the City not only retained the right to determine when any underpinning or shoring up of foundations should be done . . . but did in fact refuse or neglect to authorize the shoring up of plaintiff's house when the excavation was first made. This omission was the negligence

3. Restatement 2d, Torts §§ 413-416 (1965).

complained of as the cause of the injury. There was evidence, therefore, on which the case must have gone to the jury. . . ."

Similarly in *Spinozzi v. Lavino,* 243 F. 2d 80 (3rd Cir., 1957), Judge Kalodner pointed out:

"Both parties concede, and it is apparent from the record, that Morello (plaintiff's employer) stood in the position of an independent contractor. Plaintiff urges, however, that Lavino owed a duty of care to the decedent due to control it retained over the job, and, as a result of its failure to provide shoring Lavino should be liable for the harm to the decedent.

"It is the general rule that the employer of an independent contractor is not responsible for the misconduct of the contractor while the latter is performing under the terms of the contract. Painter v. Mayor, 1863, 46 Pa. 213; Allen v. Willard, 1868, 57 Pa. 374. The rule is justified on the ground that since the employer does not control the work being performed, he should not be liable for the harm resulting from the substandard performance of the independent contractor. Following this line of reasoning, it is apparent that where the employer [4] has retained some element of control on the job, he should be *responsible for the harmful consequences of its performance as a concomitant of the control retained.* The Pennsylvania courts have recognized that the employer should be liable where he has retained control of some part of the work . . . and his failure to exercise that control with reasonable care causes harm to others.

4. Certainly the "employer" referred to by Judge Kalodner is "the employer of an independent contractor" and he stood in the same relationship to the workman in that case as did the City to the decedents in the case at bar.

> Pender v. Raggs, 1896, 178 Pa. 337, 35 A. 1135; Stork v. Philadelphia, 1901, 199 Pa. 462, 49 Pa. 236; McGrath v. Pennsylvania Sugar Co., 1925, 282 Pa. 265, 127 A. 780 . . ." (Emphasis added.) 243 F. 2d at 82-83.

Judge Kalodner thus makes it quite explicit that the landowner who employs an independent contractor may be liable for injuries to the contractor's employees if the landowner has *either* (1) *retained control* of the work or (2) *actually exercised control* or interfered with the work to such an extent as to have assumed control, *and* if his failure to exercise that control in a reasonably prudent manner is a proximate cause of injury. *Quinones v. Township of Upper Moreland,* 293 F. 2d 237, 241 (3rd Cir., 1961), *Jamison v. Byers,* 330 F. 2d 657, 658-660 (3rd Cir., 1964). Restatement 2d, Torts, §§ 414, 416 (1965).

The City anchors its argument on the following language quoted at page 19 of its brief from *Silveus v. Grossman,* 307 Pa. 272, 161 Atl. 362 (1932):

> "The very phrase 'independent contractor' implies that the contractor is independent in the manner of doing the work contracted for. How can the other party control the contractor who is engaged to do the work and who personally knows more about doing it than the man who by contract authorized him to do it? Responsibility goes with authority." 307 Pa. at 277-78.

In that case defendant's building was destroyed by fire which left only one wall standing. Thereafter, at the direction of the Borough authorities he hired a builder to remove the wall, which was menacing plaintiff's adjacent property. In the course of the work, the wall buckled and collapsed onto plaintiff's property. Plaintiff sued both the defendant-landowner, and the contractor. A jury verdict in favor of plaintiff and against the adjacent landowner

was reversed by the Superior Court which ordered that defendant's motion for judgment N. O. V. be granted. On appeal, the Superior Court's decision was affirmed.

In *Hader v. Coplay,* 410 Pa. 139, 189 A. 2d 271 (1963), the property owner, Coplay, a cement manufacturer, purchased a stone crushing machine from Kennedy, and hired Kiefriter to build a structure to house the machine and to install it. Under the contract, Coplay could make use of any of the technical employees of Kennedy to superintend the erection or operation of the machinery. At such times Coplay would pay the employer according to a payment schedule under the contract.

Coplay under those provisions, "borrowed" one Warfield from Kennedy and during this period, plaintiff, Hader, an employee of Kiefriter, was injured while working on the construction. Hader sued Coplay and the trial court awarded a non-suit to Coplay.

On appeal, the Supreme Court affirmed, declaring:

> ". . . The common sense of this arrangement is apparent. Coplay, a cement manufacturer, lacking knowledge in its organization of the *manner* of *installation* (emphasis supplied) of a stone crusher, availed itself of the services of one who was familiar with the manner in which a stone crusher should be installed, so that Coplay might be assured Keifriter—with whom Coplay had contracted to install the crusher—was installing the crusher in accordance with the plans and specifications and in a proper and workmanlike manner. . . .
>
> ". . . An examination of the record clearly reveals that Warfield was acting as a 'watchdog' for Coplay to make sure that Keifriter installed the crusher and erected the housing in accordance with the

plans and specifications . . . Warfield's presence on the job site on behalf of Coplay and the functions which he performed in nowise demonstrated any control by Coplay of the manner of installation of the crusher." 410 Pa. at 147, 189 A. 2d at 275-276.

". . . Spinozzi v. E. J. Lavino and Co., . . . and Quinones v. Township of Upper Moreland . . . are clearly distinguishable on their facts from the case at bar." 410 Pa. at 271, 189 A. 2d at 278.

In *Celender v. Allegheny County Sanitary Authority*, 208 Pa. S. 390, 222 A. 2d 461 (1966),[5] plaintiffs were employed by a contractor, Mole, as concrete finishers on a sewer construction project for the defendant. The Authority had been created to provide for the development of a new sewer disposal system for the county. In pursuance of this purpose some twenty contracts were let for different phases of the work. The Authority did have an inspector for each contract, but did not control the method of carrying out the work. The two functions of the inspector were (1) to see that the plans and specifications were being carried out, and (2) to see that adequate safety precautions were taken.[6]

On the day of the accident, plaintiffs were travelling from one assigned job site to another and stopped at an underground structure, known as "Vault U-1", to look for a rubbing stone that one of the plaintiffs had left there previously. It being dark in the chamber, one of the plaintiffs struck a match. Gas in the chamber ignited, and the men were severely burned. At that time, Vault U-1 was not being worked, and in fact, its entrance was covered and sur-

5. Page citations "(R.)" are to the Common Pleas Court Record on Appeal to the Superior Court.

6. R. 350(a).

rounded by a wire fence. No one knew that the plaintiffs or any other workmen would be there.[7]

A non-suit was granted to the Authority at the close of plaintiff's case. In denying plaintiff's motion for removal of the non-suit, the Court of Common Pleas held:

> ". . . The contractor was in charge of the work. The particular structure where the accident occurred was capped on . . . [the day of the accident]. The men removed this cap and went in to search for a tool. The Authority is entirely too remote from this operation. . . . It neither knew nor should have known that the men would enter the structure that day.
>
> ". . . In the case at bar we can find no evidence whatsoever of control of the premises by the Authority. The last witness for the plaintiffs . . . testified that he had been employed by the Authority as an inspector and had, on a number of occasions ordered certain precautionary measures to be taken by the contractor. It appears from his entire testimony however, that he . . . had no right to stop work but only to report conditions to his supervisor . . ."
>
> "We are unable to find in this record even a scintilla of evidence of negligence on the part of the Authority . . . ."[8]

The Superior Court affirmed, based principally on the authority of *Hader v. Copley, supra,* and distinguishing the rule set out in Section 414 of Restatement, 2d Torts on the basis of comment C thereto.

Analysis of the facts and both opinions[9] in *Celender* reveal two facts which distinguish it from the case at bar.

1. The Authority, not being expert itself, retained only such supervisory control as it needed to see to it that it got

7. R. 358(a).
8. R. 360(a)-362(a).
9. Allocatur Denied, Feb. 13, 1967.

the finished product for which it had contracted, and to try to protect the workmen from undue risk of injury.

2. Regardless of how this control is characterized, the plaintiffs failed to introduce any evidence that it was not exercised in a reasonably prudent manner or that there was any reasonable relationship between the exercise of that control and the accident.

Similarly, in *Peter v. Public Constructors,* 368 F. 2d 111 (3rd Cir. 1966) although the general contractor might have chosen to reserve control of the ". . . details of the independent contractor's performance . . ."—in which case he might have been liable for ". . . negligence in the execution of the work . . ." 368 F. 2d at 113, the Court found that the general contractor *in fact did not retain nor exercise such control.*

> "The present record contains no evidence of *actual exercise of control* by Public [general contractor] of [the subcontractor] Reid's performance of the bridge demolition project. Accordingly, the trial court properly found that there was in fact no such exercise of control.
>
> "We think it equally clear that in *contracting* with Reid, Public did not *reserve the right to control* the way in which Reid would conduct its operations . . ." 368 F. 2d at 113 (Emphasis added.)

2. *Reservation of Control Under the Contract With Driscoll.*

From the uncontroverted competent evidence of record in the case at bar it is abundantly clear that the City retained the right to control the manner and method of performance by the contractor of the contract, and that its negligent exercise of that control bore a direct, foreseeable, causal relationship to the deaths of the decedents.

So clear are the facts that but for the question of the jury's finding that the City's conduct was in reckless disregard of the safety of others,[10] I would not set out these details.

Based on its many years of experience in the design and supervision of sewer construction, the City Water Department maintained its own Design Division—which prepared the plans and specifications for this project—and its own Construction Division which designated engineers and inspectors to supervise the actual construction. The plans and specifications,[11] as prepared by the Design Division, contained the following detailed provisions covering the manner and method of performance by the contractor and the daily supervisory control to be exercised by the City during the continuation of the project:

"Standard Contract Requirements.

"16. Definitions— . . .

" 'Engineer' to mean either the Chief Engineer of the Department for which work is done . . . or any deputy . . .

" 'Inspector' to mean the representative of the Engineer assigned to the inspection of materials and *workmanship* under the contract" (p. 4) (Emphasis added.) [12]

"19. Contractor's Obligation—

". . . If at any time the Contractor's *methods force or equipment appear to the Engineer to be unsafe, insufficient or inadequate* for the proper performance of the provisions of the contract, he may *order the Contractor to make such changes as he may deem*

10. Jury's Answer to Interrogatory 20(a).
11. Exhibit P-30/DC-57.
12. Page citations are to the City's Standard Contract Requirements.

necessary, and the Contractor shall comply with such orders . . ." (p. 6) (Emphasis added.)

"32. Status and Authority of Engineer—The Engineer shall have *general supervision and direction of the work,* the interpretation of the Plans and Specifications, *the ordering of additions to or deductions from the work,* and *the determination of procedure.* He shall give all *orders and directions* contemplated under the contract . . . He shall determine all other questions that may arise in relation to the execution of the work. *He shall have authority to halt the work whenever such action may be necessary to secure the safe and proper execution of the contract . . .*" (p. 6) (Emphasis added.)

"42. Inspection—*All of the work* of the contract *shall be subject to the supervision and inspection of the Engineer* or his designated representatives, and the contractor shall afford every facility for the *inspection of materials and workmanship. . . . Authorized representatives of the Department shall be permitted access at all reasonable times to all portions of the work* . . . No materials shall be used on the work until accepted by the Engineer and all materials rejected by the Engineer as unsuitable or not in conformity with the Plans and Specifications shall be immediately removed from the work. . . . *All work shall be presented in the presence of the Inspector. . . .* Work shall be done *only during regular working hours* unless specifically *authorized or directed otherwise by the Engineer. . . .*" (p. 9) (Emphasis added.)

"49. Prosecution of the Work—*The method of procedure shall be subject to approval as best adopted for the safe, efficient, and expeditious prosecution of the work,* with a minimum of interference with public traffic and convenience. *Work shall be performed at*

such times and at such places as may be ordered or approved by the Engineer. . . ." (p. 9) (Emphasis added.)

"54. Construction, Methods to be Approved—Before commencing work, the contractor shall, when required by the Engineer, submit for approval his proposed methods of prosecuting the work . . ." (p. 10)

In addition to these examples of continuing control by the City, the Special Specifications of the Contract contain particularly detailed requirements as to the actual work of constructing the sewer.[13]

I find it difficult to conceive of a greater reservation of control by the City of both the manner and method of the work and of the day-to-day supervision.

My conclusion is further supported by the testimony of Water Commissioner Samuel Baxter,[14] and Samuel Wilson,[15] head of the Construction Division, as to their understanding of the City's rights and responsibilities under the contract to see that the contractor had proper equipment, took adequate safety precautions, provided adequate supervision, and to stop the job if necessary to protect the workmen.

The conclusion is thus unavoidable that as a matter of law the City, through its contract with Driscoll, retained the right to control the manner and method of the latter's performance.

3. *Negligence by the City in the Exercise of Control.*

The jury's answer to interrogatory 2(A) speaks for itself. There can be no doubt that the evidence, as set out above supports that conclusion.

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13. Special Specifications: p. 12—Working Shaft Locations; p. 12—Lines and Grades in Tunnel; p. 13—Steel Liner Plates and Ribs; p. 17—Placing Concrete and Grout; pp. 17-18—Vacuum Processing in Tunnel.

14. N.T., 2190, 94, 96.

15. N.T., 458-59, 461, 71, 73, 80, 81-85.

4. *Proximate Cause.*

Here, too, the jury's answer to interrogatory 2(B) speaks for itself and is supported by the evidence. Furthermore, since in every possible explanation of the accident about which there was any evidence, the presence of a dangerous level of gaseous vapors was an essential ingredient, there is no need to consider the question of sufficiency of proof as between several possible causes.[16]

C. Superseding Cause to Relieve the City From Liability.

> ". . . So long as no person was permitted to enter the tunnel to work therein, the failure to comply with the regulations would have harmed no one. However, as soon as persons were permitted to work in the tunnel, Driscoll had a duty to see that its workmen had proper gas masks or blowers powerful enough to exhaust and bring in clear air into (sic) the tunnel. . . ." Brief of City of Philadelphia re its Motions for Judgment N. O. V., et seq., at 32.

Defendant, City of Philadelphia's argument, considered in the light of the uncontroverted facts in this case is tantamount to saying that it had the right to gamble its liability for injury to the workmen on the infinitesimal chance that there would be no accident; and that, if there were, Driscoll, alone would be held liable.

> ". . . The law is not so unaware of reality that it will permit a tortfeasor to turn his wrongful act into an immunity by asserting that the eventual damage resulted from a more immediate cause, when it is clear that this immediate cause was put into operation by his own tortious conduct." Thornton v. Weaker, 380 Pa. 590, 112 A. 2d 344 (1955).

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16. See Marrazzo v. Scranton Nehi Bottling Co., 422 Pa. 518, 223 A. 2d 17 (1966).

An intervening negligent act or omission which combines with a prior negligent act or omission to cause an accident will relieve the former from liability only where the latter

> ". . . was so extraordinary as not to have been reasonably foreseeable, and . . . [unlike the basis for determining foreseeability with respect to direct negligence] whether the act was reasonably foreseeable [is] to be determined by following retrospectively the sequence of events and looking back from the harm to the negligent act rather than by considering whether the defendant should prospectively have envisaged the events which unfolded and caused the accident." Wilson v. American Chain and Cable Co., 364 F. 2d 558, 562 (3rd Cir. 1966); Shinor v. Bangor Gas Co., 410 Pa. 92, 97, 188 A. 2d 734 (1963).

I have found nothing in the record nor in the briefs and arguments of counsel that would lead me to set aside the jury's findings,[17] that there was no superseding cause which, under the law, could relieve the City from liability.

D. Liability of Atlantic.

1. *Superseding Cause.*

Unlike the question of the relationship between Driscoll's conduct and the City's liability, the question of the City's conduct and Atlantic's liability[18] falls squarely within the rules governing superseding cause, as enunciated

17. Jury's answers to interrogatories 5 and 7.

18. The City bases its claim on the allegation that Atlantic is liable without proof of negligence because its conduct in operating the tank farm was an ultra-hazardous activity and because the seepage of petroleum products into soil in which the sewer was being constructed constituted trespass and/or nuisance. It is further argued that this liability renders Atlantic a joint tortfeasor. For purposes of this discussion, I assume, without deciding, the correctness of all of these propositions. However, they are discussed individually, infra.

by the Pennsylvania Courts, the Court of Appeals for the Third Circuit, and the Restatement.

In *Kline v. Moyer,* 325 Pa. 357, 191 A. 43 (1937), the defendant, Albert, had been driving on the highway towards Reading when the rear axle on his truck broke. Being alone, he left the truck and went to seek assistance. All four wheels were on the roadway. Thereafter, defendant, Moyer, proceeding in the same direction approached Albert's vehicle. He was unable to stop in time to avoid hitting it and swerved into the oncoming traffic lane, striking the car in which plaintiff was a passenger. Plaintiff sued and recovered a verdict against both defendants. The trial court granted Albert's motion for judgment N. O. V. and plaintiff appealed.

Mr. Justice (later Chief Justice) Stern for the court reviewed a number of cases involving prior and subsequent acts of negligence leading to an injury to a third party. He found the cases distinguishable based on whether or not, at the time the subsequent actor was negligent he had knowledge of the dangerous condition created by the prior act. In remanding the case for a new trial to determine whether Moyer's conduct was negligent *after* he became aware of presence of Albert's vehicle, he said:

> ". . . We would formulate the general principle as follows: Where the second actor has become aware of the existence of a potential danger created by the negligence of an original tortfeasor, and thereafter, by an independent act of negligence, brings about an accident, the first tortfeasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. . . ." 325 Pa. 364, 191 A. at 46.[19]

19. In a footnote, Mr. Justice Stern approved § 447 of Restatement of Torts and went on to say that the first actor could not reasonably foresee "an act of negligence by the second actor *after* acquiring knowledge of the danger," and that such a subsequent act of negligence would be "extraordinary" and not a "normal response."

This rule has been somewhat modified.

An intervening negligent act is not always a superseding cause which relieves an antecedent wrongdoer from liability for negligently creating a dangerous condition which results in injury. In determining whether an intervening force is a superseding cause, the Pennsylvania Supreme Court in *Hendricks v. Pyramid Motor Freight Corp.*, 328 Pa. 570, 574, stated:

> "The answer to this inquiry depends on whether the (intervening) conduct was so extraordinary as not to have been reasonably foreseeable, or whether it was reasonably to be anticipated: . . ." Stark v. Lehigh Foundries, Inc., 388 Pa. 1, 11, 130 A. 2d 123, 130 (1957); Leposki v. Railway Express Agency, 297 F. 2d 849, 850 (3rd Cir. 1962); Wilson v. American Chain and Cable Co., 364 F. 2d 558, 561 (3rd Cir. 1966).

Sections 442, 443 and 447 of Restatement, 2d Torts provide the factors relevant to the determination of whether or not an intervening [20] act constitutes a superseding cause that would relieve Atlantic of liability.

There is no need to discuss each section and the comments thereto in detail, since the instant facts permit neither question nor dispute. The degree to which the City's conduct was extraordinary is, perhaps, best highlighted by the fact that the jury considered it so grossly negligent as to amount to a reckless disregard of the safety of others.

I find as a matter of law that the City's conduct, after the alleged seepage of Atlantic's petroleum products into the ground under the highway, and after the City had knowledge of the invasion and of the danger created

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20. There is no evidence of any leakage, spillage or seepage on Atlantic's property at any particular time; certainly not at any time after the commencement of this project.

thereby, was so extraordinary as not to have been reasonably foreseeable and thus would be a superseding cause of the injuries and deaths of decedents.

2. *Trespass.*

Assuming, without deciding that the evidence would support findings that the petroleum products which ignited in the tunnel causing the explosion and fire in which decedents were killed came, in whole or in part from Atlantic's property. The invasion was not an invasion of any right of the decedents.

Kopka v. Bell Telephone Co., 371 Pa. 444, 91 A. 2d 232 (1952) holds that consequential damages to the owner of the property are recoverable in an action for trespass to the property, and the Restatement 2d, Torts, § 162 (1965) extends liability to members of the household of the possessor. However, in keeping with the basic principle that actions for trespass to land are primarily to redress invasions of the right to exclusive use and possession thereof,[21] the Restatement expresses no opinion as to liability to *servants of the possessor* who, though not members of his household are nevertheless *resident* thereon.

Decedents herein were neither the servants nor employees of the possessor—the City—nor resident on the property.[22]

While I have found no Pennsylvania cases dealing with injuries to persons bearing such relationship to the posses-

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21. Restatement 2d, Torts (1965) Scope Note to Chapter 7.

22. Even as to Section 165, Comment C limits liability to harm "connected with his interest of exclusive possession. These interests include those in bodily security and freedom from confinement, . . . and the physical condition of the members of his family and the servants belonging to his household . . ." No evidence whatsoever was introduced from which it could be said that decedents were within any of the stated categories nor that the alleged trespass by Atlantic could reasonably have been expected to invade any *such* interest. Additionally, as the discussion below states, there is no evidence that this is an ultra-hazardous activity within the meaning of sections 519 and 520, Restatement, Torts (1938).

sor of land arising out of non-negligent, *trespassory* intrusion to the land, I do not believe that the Courts of the Commonwealth would extend Kopka and the Restatement rule to permit these plaintiffs to recover from Atlantic.

3. *Nuisance.*

The applicable law under the doctrine of "nuisance" was clearly defined by the Pennsylvania Supreme Court in the case of *Waschak v. Moffat,* 379 Pa. 441, 109 A. 2d 310 (1954), where it was held:

> "It is our view that [Restatement, Torts] Section 822 comprehensively encompasses the entire statement of principles of liability . . ." Id., 379 Pa. at 454, 109 A. 2d at 317.

Section 822 reads as follows:

> The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,
>
> (a) The other has property rights and privileges in respect to the use or enjoyment interfered with, and
>
> (b) the invasion is substantial; and
>
> (c) the actor's conduct is a legal cause of the invasion; and
>
> (d) The invasion is either
>
> (i) intentional and unreasonable; or
>
> (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct." Restatement, Torts, § 822 (1939).

Section 823 defines "Persons Who Can Maintain an Action".

Section 825 defines "Intentional Invasion . . .".

Section 826 through 831 define and set out rules for balancing "gravity v. utility" for purposes of determining when the invasion is "unreasonable."

My review of the record reveals not the slightest bit of evidence from which it could be determined that the decedent's had "property rights and privileges in respect to the use or enjoyment interfered with" nor that the presence of petroleum products in the soil were, with respect to Atlantic, either avoidable or otherwise unreasonable. Thus, I find that the plaintiffs and the City having failed to provide any evidence that Atlantic had created or maintained a nuisance which invaded any right of the decedents herein and which contributed to this accident, the City has no right to contribution from Atlantic.

4. *Ultrahazardous Activity.*

Chapter 21 (§§ 519-24) Restatement, Torts, dealing with Ultrahazardous Activities, has been adopted in Pennsylvania. See *Fedorff v. Harrison,* 362 Pa. 181, 66 A. 2d 817 (1949), *Haddon v. Lotito,* 399 Pa. 521, 161 A. 2d 160 (1960), *McSparran v. Hanigan,* 225 F. Supp. 628 (E. D. Pa., 1963). However, we have been able to find no cases in Pennsylvania or in this Circuit determining whether or not the maintenance of a petroleum tank farm in an industrial, nonresidential area is per se an ultrahazardous activity within the meaning of § 520.[23]

In the case at bar the only testimony even tangentially relevant to the question of ultrahazardous activity was (1) Mr. Wakeley's testimony that the petroleum products in-

23. Restatement, Torts, § 520: "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

dicated on the spectrograph appeared to be like those stored at Atlantic (N. T. 1316); and (2) the general knowledge that the ground at or near refineries and tank farms was likely to be saturated with petroleum products (N. T. 577, 179, 80, 83, 2200).

There was no evidence of the practices employed by Atlantic or known and employed by others in the trade nor of the effect that such practices might have on leakage, spillage or seepage of petroleum. There was no testimony from which the dangerousness of a tank farm could be distinguished from that of a large service station, or other business which involves the storage of large quantities of petroleum products. See *Pryor v. Chambersburg Oil & Gas Co.*, 376 Pa. 521, 526, 103 A. 2d 425, 427-28 (1954); *Beck v. Bel Air Properties*, 134 Cal. App. 2d 839, 286 P. 2d 503, 509 (1955).

Thus, there was no factual basis from which either the Court or the jury could have found that Atlantic's operation constituted an ultrahazardous activity.

E. Contributory Negligence.

Throughout the trial, counsel for the City brought up that an employee of Driscoll, Mr. Steel, who went into the tunnel with one of the first rescue teams stated that he had found an opened package of cigarettes in the tunnel. Despite repeated assurances to the court that this would be tied in, not one additional fact was brought out to establish that any of the deceased men brought the cigarettes into the tunnel, or had smoked in the tunnel and if so which one and whether or not such smoking had actually caused this accident. To the contrary, Mr. Gass, the City Engineer, testified that he went into the tunnel and saw the pack of cigarettes after the time at which Steel was alleged to have brought them up (N. T. 1609, 15, 30-32; 2172-73).

After careful examination of the entire transcript, I am constrained to state that the errors committed at trial with respect to this issue, if any there were, were *in* not requiring counsel for the City to state with greater precision how it would tie this evidence in as a possible cause of the accident and in the absence of such further evidence *not* to have withdrawn the matter from the jury's consideration.[24] See *Papa v. Pittsburgh Penn-Center Corp.*, 421 Pa. 228, 218 A. 2d 783 (1966).

F. Assumption of Risk.

(1) The defense of assumption of risk is not available to one other than the employer of the injured employee seeking recovery. *Kulka v. Nemirovsky,* 314 Pa. 134, 139, 170 Atl. 261 (1934); *Stark v. Lehigh Foundries,* 388 Pa. 1, 130 A. 2d 123 (1957). See also Grantham, J., concurring in *Thrussell v. Handyside,* 20 Q. B. D. 359, 357 (1888):

> (2) "*It cannot be said,* where a man is lawfully engaged in his work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such. . . . It is different where there is no duty to be performed, and a man takes his chance of danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there, his poverty not his will consented to incur the danger." Thrussell v. Handyside, id. at 364.

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24. It should be noted that the jury's conclusion that the City's conduct amounted to a reckless disregard of the rights of others precludes, of itself, the granting of defendant's motions on the alleged ground of contributory negligence. See Kasanovich v. George, 348 Pa. 199, 134 A. 2d 523 (1943); Parker v. Jones, 423 Pa. 15, 223 A. 2d 229 (1966); Wilson v. American Chain and Cable Co., 364 F. 2d 558, 562 (3rd Cir. 1966).

All of the decedents in this case were working men. Typically, they relied on their regular pay checks to afford the necessities of daily living and to provide for their families. Also typically, they could ill afford to refuse to work in the tunnel when assigned to do so—even assuming that they knew that it involved a serious danger of fire and explosion—on the mere chance that their refusal would be vindicated at a later date and they would then be reimbursed for any loss of pay. See *Falyk v. Penna. R. R. Co.*, 256 Pa. 397, 400 (1917).

> (3) ". . . There may be a perception of the existence of a danger without appreciation of the risk. . . ." Yarmouth v. France (1887) 19 Q. B. D. 647.

While the workmen may have smelled gas fumes and known that they became lightheaded or nauseous from working in the tunnel, there was no evidence that they knew or should have known (a) that the vapors were at or near the explosive limit; (b) that a random spark from any source could cause a flash fire and explosion, and (c) that the equipment being used was likely to create such a spark.

The evidence is only that the odor of petroleum permeated the area. But, there was not one shred of evidence that this odor or the training or the experience of the decedents was such that they ". . . appreciate[d] the danger itself and the nature, character and extent which made it unreasonable. . . ." Restatement 2d, Torts, § 496(D), Comment (b) (1965); *Falyk, supra,* at 401; *Madden v. Lehigh Valley R. R. Co.*, 236 Pa. 104, 109, 84 Atl. 672 (1912); *Valjago v. Carnegia Steel Co.*, 226 Pa. 514, 519-520, 73 Atl. 728 (1910). See also Restatement 2d, Torts, § 496(D), Comment (c) and § 496(c), Illustration 7 to Comment (i).

In view of the above, the error with respect to this issue, if any, as with the issue of contributory negligence,

was in submitting the question to the jury for its consideration rather than ruling in favor of the plaintiffs as a matter of law. Nevertheless, since the jury had spoken and the evidence clearly supports their determination, the matter is closed.

G. Punitive Damages.

1. *Under the Facts of This Case.*

> "Although under Pennsylvania law a punitive award may be made against a corporation for an employee's tort, the conduct of the agent must be clearly outrageous to justify vicarious imposition of exemplary damages upon the principal. (Citing cases) . . .
>
> " 'Punitive damages' are penal in character, . . . and are allowed only when defendant is guilty of . . . such reckless disregard of the rights of others as to raise a necessary presumption on conscious indifference to consequences. . . ." (Brief of Defendant, City of Philadelphia, at 61.)

I accept defendant's statement of the law as noted above. However, the jury, which listened to all of the testimony and considered all of the evidence, under appropriate instructions, concluded that the City's conduct did amount to that degree of "reckless disregard of the safety of others."[25] Having carefully reviewed the record, I see no reason to set aside that finding.

2. *Punitive Damages Against a Municipality.*

No Pennsylvania cases have been found expressly allowing *or* rejecting an award for punitive damages against a municipality. However, I do think that the cases shed substantial light on the problem.

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25. Jury's answer to interrogatory 20(a).

In *New Castle Products, Inc. v. School District of Blair Township,* 18 F. Supp. 335 (W. D. Pa. 1936), an action based on diversity of citizenship seeking compensatory and punitive damages for conversion was dismissed for want of the $3,000 jurisdictional amount. The materials converted were valued at approximately $2,000, and the balance of plaintiff's claim for $3500 was based on punitive damages. In dismissing the case, the District Court ruled that punitive damages were not recoverable. Several factors, however, distinguish that case in such a manner as to support a decision allowing punitive damages in the case at bar.

(a) *New Castle Products* was decided prior to the decision of the United States Supreme Court in *Erie v. Tomkins,* 304 U. S. 64, 58 S. Ct. 817 (1938) which held that in diversity cases the District Court was bound to apply the law that a state court in the forum state would have applied had the case been tried there. At that time, the federal district courts were free to ignore the state rules, and fashion a general federal common law, (see *Swift v. Tyson,* 16 Pet. (41 U. S.) 1, 10 L. Ed. 865 (1842)), which is exactly what the court in *New Castle Products* did:

> ". . . The question of the liability of a municipal corporation, or a quasi municipal corporation, for punitive damages has not been passed upon by the appellate courts of Pennsylvania. There is dicta indicating such liability by municipal corporations. Armstrong and Latta v. City of Philadelphia, 249 Pa. 39, 94 A. 455 (1915). . . . Spencer v. Carlisle Borough, 63 Pa. Super. 513. See Hermits of St. Augustine v. County of Philadelphia, Brightly N. P. (Pa.) 116 (4 Clerk 120, 7 Pa. L. J. 124); Howell v. Borough of West Chester, 26 Lanc. Law Rev. (Pa.) 201. . . .

> "The great weight of authority outside of Pennsylvania is to the effect that municipal corporations are not liable for punitive damages. . . .
>
> "I am in accord with the [latter] . . . view . . ." New Castle Products, supra, at 336-337.

Thus it would seem, that to the extent that there was authority in the Pennsylvania courts on this point, that authority would hold the City to be liable for punitive damages.

(b) The court either assumed or decided that the defendant, School District of Blair Township, was engaged in the performance of a *governmental* function. (Emphasis added.) In the case at bar, the City was engaged in a proprietary function. *Quinones v. Township of Upper Moreland,* 293 F. 2d 237 (3rd Cir. 1961).

In light of the wording of the City Ordinance waiving any immunity from tort liability of the City—even for governmental functions—that injured persons

> ". . . shall have the right to bring suit against the City *in accordance with the same rules of law* as applied by the Courts of this Commonwealth *against any other party defendant.* . . ." Philadelphia Code, Ch. 21-700 (1962). (Emphasis added.)

and in light of the recent decisions of the Pennsylvania Supreme Court removing immunity from tort liability from charitable institutions,[26] I believe that the Pennsylvania courts, were they now to consider the question of liability of the City of Philadelphia for punitive damages growing out of its conduct of a non-governmental function, would hold, as I do here, that the City should be liable.

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26. See Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A. 2d 193 (1965).

3. *Under the Survival Act.*

The Survival Act[27] specifically states:

> "All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death of the plaintiff. . . ."

No mention is made of damages per se. We see no reason to read into the act a limitation on the nature or amount of recovery. Certainly, the legislature was aware that the courts of Pennsylvania recognized punitive damages in an appropriate case, when they passed the act. See *Thompson v. Swank,* 377 Pa. 158, 176 A. 211 (1934); *Adelman v. Rosenbaum,* 133 Pa. Super. 386, 3 A. 2d 15 (1938); *Hughes v. Babock,* 349 Pa. 475, 37 A. 2d 551 (1944).

Furthermore, since the function of punitive damages is to punish outrageous conduct and to discourage similar conduct in the future, Restatement, Torts, § 908, Comment (a) (1939), it would appear to be inconsistent to disallow such an award where the conduct of the defendant is not only reprehensible but in fact results in death.

H. Atlantic's Cross Claim Against the City.

Atlantic argues that under § 97 of the Restatement of Restitution,[28] had they been found negligent, since the jury found the City in reckless disregard of the safety of others,[29] they would have been entitled to restitution from the City for the amount of their payment to the plaintiffs plus reasonable counsel fees,[30] and that *a fortiori,* since

27. 20 Pa. Stat. Ann. § 320-601 (1949).

28. "A person whose negligent conduct combined with the reckless . . . conduct of another has resulted in injury for which both have become liable in fact to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tortfeasor could not have done so." Restatement, Restitution, § 97 (1936).

29. Answer to Special Interrogatory 20(a).

30. See Orth v. Consumers Gas Co., 280 Pa. 118, 121 (1924).

they were found not negligent they should be entitled to recover. This statement, however, begs the question for, as Comment (a) to § 97 states:

> "The rule stated in this section applies where the circumstances are such that both the payor and the other are liable to the injured person . . ."

Similarly, in *Orth v. Consumers Gas Co.*, 280 Pa. 118 (1924), plaintiff's verdict against the Gas Company for indemnity *followed* the suit by injured parties against him in which *his liability was established* by an adverse verdict.[31] The Pennsylvania Supreme Court characterized the plaintiff's right as the right of one

> ". . . who has been *compelled* to pay damages for a default arising out of the wrongful act of another—to recover indemnity from the persons whose initial negligence was the primary cause of the injury. (Citing authority) . . ." (Emphasis added.) Id. at 121.

In the case at bar, however, no liability on the part of Atlantic had been established at the time of their settlement with the plaintiffs. Thus, unlike the plaintiff in the case of *Philadelphia Co. v. Traction Co.*, 165 Pa. 456, 459-60, 426 (1895)—where a settlement of less than the amount of the verdict was made prior to appeal, and the defendant in the first case then sued for indemnification—Atlantic, here, was a volunteer.

In addition, Atlantic as is shown by its settlement with the plaintiff, believed that there was a possibility that the jury would find that they had been negligent also, and that the City had not been guilty of recklessness. In the face of the *possibility of greater liability*—as against the possibility of no liability—they agreed to a fixed payment. Such is the basis of most, if not all, settlements,

31. Id. at 120.

and where there are multiple parties each tries to time his offer to get the best terms for his party.

Viewed in that light, Atlantic's claim is that the City, by not settling what it must have known from the discovery to have been a legitimate claim, required Atlantic to go to the expense of this extended litigation—not *to pay the* amount of the settlement.

Nevertheless, Atlantic, urges that assessing the City in this case for the amount of their settlement plus their costs of litigation, will encourage settlements and discourage unreasonable refusal to settle where there are multiple defendants.[32]

However, such a rule would generate additional litigation. In every case in which after one co-defendant settles and is found not reckless the non-settling co-defendant is found reckless and is called on to indemnify the other, the non-settling co-defendant would seek to litigate the reasonableness of his refusal to settle.

For the reasons thus stated, Atlantic's motion for judgment on its cross claim against the City, and all of the City's motions for directed verdict and to set aside the verdict have been denied.

J.

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32. Atlantic makes no suggestion as to whether or not the rule they espouse, insofar as it applies to the costs of litigation, should inure to the benefit of plaintiffs also.

APPENDIX.

INTERROGATORIES TO BE SUBMITTED TO THE JURY.

PART I.

NEGLIGENCE AND PROXIMATE CAUSE.

1(A) WAS THE CITY OF PHILADELPHIA NEGLIGENT IN RESPECT TO THE DESIGN OF THE SEWER? YES X NO —

INSTRUCTIONS: If you have answered 1(A) "Yes", answer 1(B); If you have answered 1(A) "No", Do Not answer 1(B).

1(B) WAS SUCH NEGLIGENCE A PROXIMATE CAUSE OF THE ACCIDENT? YES X NO —

2(A) WAS THE CITY NEGLIGENT IN RESPECT TO THE ACCUMULATION OF GASEOUS VAPORS? .... YES X NO —

INSTRUCTIONS: If you have answered 2(A) "Yes", answer 2(B); If you have answered 2(A) "No", Do Not answer 2(B).

2(B) WAS SUCH NEGLIGENCE A PROXIMATE CAUSE OF THE ACCIDENT? YES X NO —

3(A) WAS THE DRISCOLL CONSTRUCTION COMPANY NEGLIGENT? YES X NO —

INSTRUCTIONS: If you have answered 3(A) "Yes", answer 3(B); if you have answered 3(A) "No", Do Not answer 3(B).

3(B) WAS SUCH NEGLIGENCE A PROXIMATE CAUSE OF THE ACCIDENT? YES X
NO —

4(A) WAS ATLANTIC REFINING COMPANY NEGLIGENT? YES —
NO X

INSTRUCTIONS: If you have answered 4(A) "Yes", answer 4(B); If you have answered 4(A) "No", Do Not answer 4(B).

4(B) WAS SUCH NEGLIGENCE A PROXIMATE CAUSE OF THE ACCIDENT? YES —
NO —

II.

SUPERSEDING CAUSE RE NEGLIGENCE.

INSTRUCTIONS: If you have answered questions 1(A) "Yes" and 1(B) "Yes", and 3(A) "Yes" and 3(B) "Yes", answer this question No. 5. *If* you have answered any one or more of them "No", Do Not answer this question No. 5.

5. WAS THE NEGLIGENCE OF DRISCOLL CONSTRUCTION COMPANY, INC., WHICH YOU HAVE FOUND IN ANSWERING QUESTIONS 3(A) "YES", A SUPERSEDING CAUSE OF THE ACCIDENT THAT WOULD RELIEVE THE CITY OF LIABILITY FOR ANY NEGLIGENCE WITH RESPECT TO DESIGNING THE SEWER? YES —
NO X

INSTRUCTIONS: If you have answered questions 1(A) "Yes" and 1(B) "Yes", and 4(A) "Yes" and 4 (B) "Yes", answer this question No. 6. *If*

you have answered any one or more of them "No", Do Not answer this question No. 6.

6. WAS THE NEGLIGENCE OF ATLANTIC REFINING COMPANY, WHICH YOU HAVE FOUND IN ANSWERING QUESTION 4(A) "YES", A SUPERSEDING CAUSE OF THE ACCIDENT THAT WOULD RELIEVE THE CITY OF LIABILITY FOR ANY NEGLIGENCE WITH RESPECT TO DESIGNING THE SEWER? YES__ No __

INSTRUCTIONS: If you have answered questions 2(A) "Yes" and 2(B) "Yes" and 3(A) "Yes" and 3 (B) "Yes", then answer this question No. 7. *If* you have answered any one or more of them "No", Do NOT answer this question No. 7.

7. WAS THE NEGLIGENCE OF DRISCOLL CONSTRUCTION COMPANY, WHICH YOU HAVE FOUND IN ANSWERING QUESTION 3(A) "YES", A SUPERSEDING CAUSE OF THE ACTION THAT WOULD RELIEVE THE CITY OF LIABILITY FOR ANY NEGLIGENCE WITH RESPECT TO THE ACCUMULATION OF GASEOUS VAPORS? YES__ No X

INSTRUCTIONS: If you have answered questions 2(A) "Yes" and 2(B) "Yes", and 4(A) "Yes" and 4 (B) "Yes", then answer this question No. 8. *If* you have answered any one or more of them "No", Do Not answer this question No. 8.

8. WAS THE NEGLIGENCE OF THE ATLANTIC REFINING COMPANY, WHICH YOU HAVE FOUND IN ANSWERING QUESTION 4(A) "YES", A SUPERSEDING CAUSE OF THE ACCIDENT, THAT WOULD

RELIEVE THE CITY OF LIABILITY FOR ANY NEGLIGENCE WITH RESPECT TO THE ACCUMULATION OF GASEOUS VAPORS? YES— NO —

INSTRUCTIONS: If you have answered questions 3(A) "Yes" and 3(B) "Yes", and 4(A) "Yes" and 4 (B) "Yes", then answer this question No. 9. *If* you have answered any one or more of them "No", Do NOT answer this question No. 9.

9. WAS THE NEGLIGENCE OF THE ATLANTIC REFINING COMPANY, WHICH YOU HAVE FOUND IN ANSWERING QUESTION 4(A) "YES", A SUPERSEDING CAUSE OF THE ACCIDENT, THAT WOULD RELIEVE THE DRISCOLL CONSTRUCTION COMPANY OF LIABILITY FOR ANY NEGLIGENCE? YES— NO —

INSTRUCTIONS: If you have answered questions 4(A) "Yes" and 4(B) "Yes" and 1(A) "Yes" and 1 (B) "Yes", answer this question No. 10. *If* you have answered any one or more of them "No", Do NOT answer this question No. 10.

10. WAS THE NEGLIGENCE OF THE CITY OF PHILADELPHIA WHICH YOU HAVE FOUND IN ANSWERING QUESTION 1(A) "YES" A SUPERSEDING CAUSE OF THE ACCIDENT THAT WOULD RELIEVE THE ATLANTIC REFINING COMPANY OF LIABILITY FOR ANY NEGLIGENCE? YES— NO —

INSTRUCTIONS: If you have answered questions 4(A) "Yes" and 4(B) "Yes" and 2(A) "Yes" and 2 (B) "Yes", then answer this question No.

11. *If* you have answered any one or more of them "No," Do Not answer this question No. 11.

11. Was the Negligence of the City, Which You Have Found in Answering Question 2(A) "Yes" a Superseding Cause of the Accident Which Would Relieve the Atlantic Refining Company of Liability for Any Negligence? Yes__ No __

Instructions: If you have answered questions 4(A) "Yes" and 4(B) "Yes" and 3(A) "Yes" and 3 (B) "Yes", then answer this question No. 12. *If* you have answered any one or more of them "No, Do Not answer this question No. 12

12. Was the Negligence of Driscoll Construction Company, Which You Have Found in Answering Question 3(A) "Yes", a Superseding Cause of the Accident Which Would Relieve the Atlantic Refining Company of Liability for Any Negligence? Yes__ No __

PART III.

Contributory Negligence and Assumption of Risk.

Instructions: Answer all questions from 13 to 18.

13. Was Plaintiff-Decedent, James C. Hennigan, Guilty of Contributory Negligence? Yes__ No X

14. Was Plaintiff-Decedent, John Riddick, Guilty of Contributory Negligence? Yes— No X

15. Was Plaintiff-Decedent, Robert C. Wilson, Guilty of Contributory Negligence? Yes— No X

16. Did Plaintiff-Decedent, James C. Hennigan, Assume the Risk for the Type of Accident Which Caused His Injury and Death? Yes— No X

17. Did Plaintiff-Decedent, Robert C. Wilson, Assume the Risk for the Type of Accident Which Caused His Injury and Death? Yes— No X

18. Did Plaintiff-Decedent, John Riddick, Assume the Risk for the Type of Accident Which Caused His Injury and Death? Yes— No X

PART IV.

Reckless Disregard of the Safety of Others.

19(A) Do You Find That in the Design of the Sewer the City's Conduct Was a Reckless Disregard of the Safety of Others? Yes— No X

Instructions: If you have answered 19(A) "Yes", answer 19(B); If you have answered 19(A) "No", Do Not answer 19(B).

19(B) Was Such Conduct One of the Proximate Causes of the Accident? Yes— No—

20(A) IN PERMITTING THE ACCUMULATION OF GASEOUS VAPORS, DO YOU FIND THAT THE CONDUCT OF THE CITY WAS A RECKLESS DISREGARD OF THE SAFETY OF OTHERS? YES X NO —

INSTRUCTIONS: If you have answered 20(A) "Yes", answer 20(B); If you have answered 20(A) "No", Do Not answer 20(B).

20(B) WAS SUCH CONDUCT ONE OF THE PROXIMATE CAUSES OF THE ACCIDENT? YES X NO —

PART V.

COMPENSATORY DAMAGES.

INSTRUCTIONS: If you have answered 1(A) and 1(B) "Yes", or 2(A) and 2(B) "Yes", or 3(A) and 3(B) "Yes", or 4(A) and 4(B) "Yes", in what amount do you assess compensatory damages?

(A) HENNIGAN:

SURVIVAL ACTION	$101,150
WRONGFUL DEATH	$ 11,270

(B) RIDDICK:

SURVIVAL ACTION	$129,520
WRONGFUL DEATH	$ 8,385

(C) JOHNSON:
(WILSON)

SURVIVAL ACTION	$130,730
WRONGFUL DEATH	$ 8,245

PART VI.

Punitive Damages.

Instructions: If you have answered 19(A) and 19(B) "Yes", and/or 20(A) and 20(B) "Yes", in what amount do you assess punitive damages?

(A) Hennigan $25,000
(B) Riddick $25,000
(C) Johnson $25,000
(Wilson)

APPENDIX IV.

ORDER (IN ALL CASES).

And Now, this 29th day of September, 1967, after consideration of the record, briefs and oral argument, the motions of the City of Philadelphia for Judgment N. O. V. or in the alternative for a new trial against the plaintiffs and for credit against its liability to the plaintiffs, and for Judgment in its cross claim against Atlantic, the motion of Atlantic for judgment on its cross claim against the City of Philadelphia, and all related motions are hereby denied.

By THE COURT:

A. Leon Higginbotham, Jr., *J.*

APPENDIX V.

OPINION OF THE COURT.

(Filed September 10, 1968.)

PER CURIAM:

On August 22, 1962, four employees of Driscoll Construction Company were killed in an explosion while working on the construction of a sewer tunnel in the City of Philadelphia. The explosion apparently resulted from the ignition of petroleum vapors which had accumulated in the tunnel.

The personal representatives of three of the decedents brought diversity actions in the district court under Pennsylvania's wrongful death and survival statutes [1] against Atlantic Refining Company and the City of Philadelphia. Atlantic and the City filed cross claims against each other and Atlantic filed third-party complaints against Driscoll.[2] The third-party complaints were dismissed by stipulation, and the cases against Atlantic and the City were submitted to a jury on special interrogatories. The jury found that the City had been negligent and had acted with reckless disregard for the safety of others, that its negligence was the proximate cause of the explosion, that Atlantic was not negligent, and that the decedents had not been contributorily negligent and had not assumed the risk of the type of accident which caused their deaths. The jury awarded plaintiffs compensatory and punitive damages against the City. The court entered judgment against the City and denied the cross claims of both the City and Atlantic. The City has appealed.

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1 12 Purdon's Pa. Stat. Annot. §§ 1601-04 (wrongful death); 20 Purdon's Pa. Stat. Annot. § 320.603 (survival).

2 The City filed third-party complaints against the Gulf Oil Corporation, but these complaints were dismissed with prejudice before trial and are in no way involved in the present appeals.

The sewer construction project was located under a street adjacent to the petroleum storage facilities of Atlantic. The Water Department of the City of Philadelphia drew the plans and specifications for the tunnel, and the contract between the City and Driscoll, the contractor for the project, provided that an inspector from the Water Department was to be present at all times during the actual construction work to assure compliance with the plans and specifications.

The soil in the area surrounding the tunnel site was heavily saturated with petroleum products which had leaked or spilled from the refinery and storage facilities of Atlantic and other companies in the area. The tunnel as designed ran through the water table, and consequently petroleum products which were in the soil and rose to the top of the water table, were inevitably exposed in the tunneling process, and heavy concentrations of gas from them filled the tunnel. The log book of the contractor showed that problems continually arose because of the presence of the highly inflammable gas in the tunnel, necessitating the use of high-powered blowers and the wearing of gas masks. A sample of liquid taken from the tunnel by the City's inspector over two months before the date of the explosion indicated the presence of highly inflammable compounds having low ignition temperatures.

The plaintiffs' claim at trial was that the City, which had reason to know of the concentration of petroleum wastes in the ground before the project was designed, was negligent both in designing the sewer tunnel and in failing to order proper precautions with regard to the accumulation of vapors in the tunnel. The jury found the City negligent on both theories, and in addition found that it acted with reckless disregard for the safety of the decedents in failing to take proper precautions against the known danger

of fire and explosion. The district court in denying the City's motion for judgment n.o.v. or in the alternative for a new trial painstakingly reviewed the multitudinous claims here raised and in an exhaustive opinion as yet unreported, found them without merit. In our opinion the district court committed no prejudicial error and its discussion of the legal problems which the City presented to it amply justifies its judgment.

The judgment of the district court will be affirmed.

APPENDIX VI.

JUDGMENT IN 17017.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 7, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 10, 1968.

APPENDIX VII.

JUDGMENT IN 17018.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 7, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 10, 1968.

APPENDIX VIII.

JUDGMENT IN 17019.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 7, 1966, be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

September 10, 1968.

APPENDIX IX.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge,* MCLAUGHLIN, KALODNER, FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

The petition for rehearing filed by City of Philadelphia, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Van Dusen, Circuit Judge, disqualifies himself from participating.

By THE COURT.

FREEDMAN,
Judge.

Dated: October 4, 1968.

APPENDIX X.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT STAYING ISSUANCE OF MANDATE.

Pursuant to Rule 36(2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until November 1, 1968.

ABRAHAM L. FREEDMAN,
Circuit Judge.

Dated: October 21, 1968.

APPENDIX XI.

To JOHN E. WALSH, JR.
Register of Wills for the County of Philadelphia,
in the Commonwealth of Pennsylvania.

In the matter of the Administration of the Goods, Chattels, Rights and Credits of ROBERT C. WILSON, Deceased.

PETITION.

The Petition of Roger A. Johnson, nominee of Robert T. Lynch, Guardian of the Estate of Sharon Anne Wilson, a Minor, wife of the decedent respectfully showeth that the above decedent was domiciled in the Commonwealth of Pennsylvania; that his last family or principal residence was 716 D Rhawn Street, Philadelphia and that he departed this life intestate at Philadelphia in the County of Philadelphia and State of Pennsylvania on the 22nd day of August A. D. 1962 at 8:30 o'clock A. M. at the age of 26 years. That the said Robert C. Wilson deceased left him surviving the following-named widow or husband, heirs and next of kin, to wit:—

	Relationship	*Residence*
Sharon Anne Wilson	Wife	716 D Rhawn Street, Phila.
Karen Anne Wilson	Daughter	716 D Rhawn Street, Phila.

and no other next of kin.

The said intestate was possessed of personal property wherever situate to the value of $100.00; and of real estate in the Commonwealth of Pennsylvania (less incumbrance) to the value of $ 0 . Therefore the said Roger A. John-

son respectfully applies for Letters of Administration upon the assets, of which said Robert C. Wilson died possessed. February 18, A. D. 1963.

ROGER A. JOHNSON
203 Chestnut Avenue, Westmont, New Jersey
(Address)

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA. } *ss.*

Roger A. Johnson, the petitioner, named in the above application, being duly sworn according to law say that the matters and things set forth in the foregoing Petition are true to the best of his knowledge and belief.

Sworn and subscribed before me,
Philadelphia, 2/18 A. D. 1963
J. V. McGRATH
For the Register.

ROGER A. JOHNSON.
Roger A. Johnson.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

Registers' Office, 15th October 1968

I, JOHN E. WALSH, JR., Register of Wills and ex-officio Clerk of the Orphans' Court for the County of Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a full and perfect copy of the PETITION FOR LETTERS OF ADMINISTRATION, in the Estate of ROBERT C. WILSON, deceased, granted unto ROGER A. JOHNSON, on February 18, 1963 as the same remains on file and of record in this office.

In Testimony Whereof, I have hereunto set my hand and official seal at Philadelphia the date above.

J. VINCENT MCGRATH, *Deputy.*
Register of Wills and ex-officio Clerk of the Orphans' Court

(SEAL)